93-217

JUN 14 1993

No. _____

In The

Supreme Court of the United States

October Term, 1993

TAYLOR INVESTMENT, LTD., COLLEEN DUFFY PRICE and JAMES P. DUFFY,

Petitioners,

v.

UPPER DARBY TOWNSHIP, DONALD C. PHILLIPS, JAMES C. WARD, RUDOLPH D'ALESIO, MARIO L. CIVERA and NANCY WHITE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts' extension of the *Williamson* Ripeness requirement to plaintiffs' substantive and procedural due process claims grounded in the revocation of an already-issued permit, is contrary to this Court's decision in *Patsy v. Florida Board of Regents* since petitioners challenged the constitutionality of respondents' conduct, not the constitutional rationality of the zoning regulations as applied to plaintiffs' property?

2. Whether the lower courts' extension of the *Williamson* rationale to a case where petitioners have alleged and shown that they were divested of a property right based on a racially discriminatory intent to prevent black patrons from doing business in the Township, is contrary to this Court's decisions in *Patsy v. Florida Board of Regents, Sullivan v. Little Hunting Park,* and *Arlington Heights v. Metropolitan Housing Corp.*?

3. Whether the lower court erred in concluding that plaintiffs' procedural due process claims were not ripe for review where respondents revocation of an already-issued permit inflicted immediate constitutional harm on petitioners?

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Third Circuit denying the Petition for Rehearing on March 16, 1993, and the Panel Opinion issued on January 15, 1993.

OPINIONS BELOW

The Opinion of the trial court granting respondents' Motion for Summary Judgment was entered February 27, 1992. The Order is not officially reported and is reproduced at Appendix, pp. 1a to 11a.

The Opinion from the Panel of the U.S. Court of Appeals for the Third Circuit denying petitioners' direct appeal was filed on January 25, 1993. The Order is not officially reported and is reproduced at Appendix, pp. 12a-34a.

A timely Petition for Rehearing was filed and was denied by Order dated March 16, 1993. The Order is not officially reported and is reproduced at Appendix, pp. 35a-36a.

JURISDICTIONAL STATEMENT

The U.S. Court of Appeals for the Third Circuit's Order denying timely Petition for Rehearing was filed on March 16, 1993. Appendix, pp. 35-36a. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254, petitioners having asserted below and asserted herein errors under the laws and Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States.

2. This case involves 42 U.S.C. Sections 1981, 1982 and 1983.

STATEMENT OF THE CASE

A. Procedural History

Plaintiffs Taylor Investment Ltd. ("Taylor"). Colleen Duffy Price ("Price") and James P. Duffy ("Duffy, Sr.") brought this action to challenge defendants' conduct in connection with the revocation of two use permits issued with respect to property in Upper Darby Township owned by Taylor. The Complaint alleged that defendants' conduct with respect to the revocation of the use of permits violated plaintiffs' constitutional and statutory rights in that the revocations: (a) deprived plaintiffs of liberty and property interests without due process of law; (b) were arbitrary, capricious and an abuse of governmental power, and (c) denied plaintiffs equal protection of the laws, all in violation of 42 U.S.C. Sections 1981, 1982 and 1983. The Complaint also alleged that defendants' conduct amounted to intentional interference with plaintiffs' business relations, actionable at common law.

Shortly after the Taylor Complaint was filed, VGM Corporation ("VGM") and Gregory Patlakh ("Patlakh"), lessees of the property that was the subject of the revoked permits, filed an action against the same defendants arising out of the same facts and circumstances that formed the basis of the Taylor Complaint.

By Order dated July 3, 1991, the two actions were consolidated for purposes of discovery and trial.

On February 27, 1992, the court below, by Judge Raymond J. Broderick, Jr., granted defendants' Motion for Summary Judgment in its entirety on the grounds that plaintiffs' claims were not ripe for judicial review. The Court entered judgment in defendants' favor and against plaintiffs on all of plaintiffs' claims in both actions.

On January 25, 1993 a Panel of the U.S. Court of Appeals for the Third Circuit issued an Opinion affirming the grant of Summary Judgment by the trial court below.

A timely Petition for Rehearing was filed and a full Third Circuit denied the Petition for Rehearing on March 16, 1993.

B. Factual History

The petitioners in this action are plaintiffs Taylor, a limited partnership and owner of the property located at 3 South State Road in Upper Darby Township, Price, a general and limited partner in Taylor, and Duffy, Sr., a general partner in Taylor. James P. Duffy, Jr., ("Duffy, Jr.") is a limited partner in Taylor and was a general partner at the time of many of the events complained of in this lawsuit. He is not a party to this action. Duffy Sr. is the father of Price and Duffy Jr. (Third Circuit Joint Appendix at 50-52. Hereinafter, citations to the Third Circuit Joint Appendix shall be referred to as "J.App." at ___).

The petitioners in the related action on appeal are plaintiffs Patlakh and VGM, lessees of the 3 South State Road property. The respondents in both actions are defendants Upper Darby Township ("Township"), Donald C. Phillips ("Phillips"), the Director of the Department of Licenses and Inspection and the Zoning Officer for Upper Darby Township, James J. Ward ("Ward"), Mayor of Upper Darby Township[1], Rudolph D'Alesio ("D'Alesio"), the Vice President of the Upper Darby Township Council, Mario L. Civera ("Civera"), the State Representative of the 164th Legislative District and Councilman-at-Large for Upper Darby Township, and Nancy White ("White") a member of the Township Council.

The property that is the subject of this lawsuit is located at 3 South State Road in Upper Darby Township, Delaware County, Pennsylvania, approximately 50 yards from the busy commercial corner where State Road meets West Chester Pike. Although the area in which the property is located is zoned C-1, the property had been used as a non-conforming health club, a C-2 recreational use, for ten years prior to Taylor's purchase of the building in March of 1990. Before its use as a health club, it had been used as a car dealership (a use permitted by special exception in C-2 zones) for over 40 years. (J.App. at 59-60, 75-77, 141-43, 244 and 26). The lower two floors of the property, approximately 13,000 square

[1] Mayor Ward is now deceased.

feet, are leased to the General Services Administration ("GSA"), an agency of the federal government, and house a telecommunications office of about 90 employees for the Social Security Administration. (J.App. at 66, 164). That use, which is clearly a C-2 use under the applicable regulations[2] has been permitted by the Township. (J.App. at 76, 164).

On or about July 18, 1990, Weichert Commercial Realtors introduced Price and Duffy Jr. to Patlakh, a potential tenant who was looking to rent approximately 5,000 square feet of space for use as a billiard sports club. (J.App. at 89-90). After looking at the 10,000 square feet available on the second floor at 3 South State Road, and discussing the issue with Price and Duffy Jr., Patlakh expressed an interest in leasing the property to operate a sports club containing 25 to 30 billiard tables, indoor golf games, basketball games, baseball games and soccer or hockey games. Patlakh also wanted to operate a snack bar on the premises. No alcoholic beverages were to be served. (J.App. at 91-93, 274-80).

The evidence shows that the plaintiffs applied for and received two permits for this use and that plaintiffs made no attempt at any time to hide from anyone the type of activity that Patlakh wanted at the center. (*See e.g.*, J.App. at 248, 251-57). To the contrary, a number of Township officials knew either directly from conversations with the plaintiffs or from documents submitted by plaintiffs to the Township, that Patlakh planned a sports center with 25 pool tables at the site, not a health club. See *infra* at pp. 6-10.

The first Township official with whom Price and Duffy Jr. discussed the proposed use was Mario Civera, the State

---

[2] C-2 uses are described in the Upper Darby Zoning Ordinances as commercial uses "for general business activities having a Township-wide or larger trading area." A C-2 office use is contrasted with a C-1 office use on the basis that the latter is established to provide services to "meet the need of individuals living in the immediate neighborhood of C-1 Districts." A federal government office of 90 employees providing telecommunication services for the Social Security Administration for the entire State of Pennsylvania is clearly not directed towards "meeting the needs of individuals living in the immediate neighborhood," and consequently, is more properly considered a C-2 office use. *See* Upper Darby Zoning Ordinances at sections 501 and 502. (J.App. 23, 25).

Representative of the 164th Legislative District of Pennsylvania and a Councilman at large for Upper Darby Township. During this meeting with Civera on July 26, 1990, Price and Duffy Jr. discussed ***in detail*** the specifics of the tenant's planned use of the property and specifically disclosed that the tenant planned to include up to 30 billiard tables at the site along with basketball games, baseball games, golf games and hockey or soccer games. (J.App. at 79-80, 167-68). Civera, Price and Duffy Jr. discussed whether the tenant's proposed use would be permitted in the building at 3 South State Road and Civera stated that he thought the planned use would be consistent with the previous nonconforming use, even though the planned use was for a sports club, not a health club. (J.App. at 168).

On July 26, 1990, following their meeting with Civera, Price and Duffy Jr. met with Donald C. Phillips, Director of the Department of Licenses and Inspection and the sole Zoning Officer for Upper Darby Township for almost 20 years, to discuss the planned use by the tenant Patlakh. During this over 40 minute conversation, Price and Duffy Jr. described in detail the use to which the proposed tenant Patlakh intended to put the property. Particularly, they described the use to include 25 to 30 billiard tables, basketball, baseball cages, golf games and hockey or soccer. (J.App. at 82-85, 182-83). Phillips understood perfectly well that the proposed use was not as a nautilus-type of health club but nevertheless believed that the proposed use could be permitted as similar to the previous nonconforming use and classification:

> Q: Now you had conversations about Price and Duffy continuing that previous use.
>
> A: Well, they wanted to. They wanted it to be expanded to allow what they put down on their application. They were obviously not going to be a physical fitness type club but wanted to use it as what I would call a sports center, broad sense.
>
> Q: What did you understand the use of the club as a sports center to entail?

A: Many, many uses. They talked about batting cages for baseball, golf, basketball, which I was very much interested in, billiard tables, snack bar.

Q: So you understood that the use that they were going to have as a sports center was going to be different than the health club use.

A: Different than a health club, yes.

Q: Was it your understanding that nevertheless the sports center use could be permitted?

A: Yes.

(J.App. at 210-11, 251-53).

Based on his meeting with the Taylor petitioners described above and on the Application for Certificate of Use filed contemporaneously therewith, Phillips issued the first Certificate of Use, No. U-7319 on August 1, 1990. (J.App. at 251).

Thereafter, Patlakh, the prospective tenant, formed VGM Corporation to act as the tenant of the property. Because Patlakh wanted to have a use permit issued in the tenant's correct name, he, with the aid of Price[3], prepared a second application for a Certificate of Use. The second application described the use as follows:

Billiards (25), indoor baseball and hockey (snack bar second floor).

(J.App. at 252). Phillips testified that he read the Application and signed it on the line indicating his approval of the Certificate of Use. (J.App. at 216-17). Indeed Phillips testified that he actually discussed the 25 billiard tables with Joseph Fanning, the Director of the Mercantile Department of Licenses and Inspection:

Q: What do you recall the conversation being about?

A: The only thing I remember (Mr. Fanning) saying was that Mr. Patlakh was in to get a Mercantile

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[3] Patlakh is a Russian immigrant who is not fully versed in the English language.

> License to operate 25 pool tables, was that O.K. at this location, and I said yes.

(J.App. at 221).

Based on this second application, the Township issued Certificate of Use #U-7384 permitting the operation of a sports club with 25 billiard tables. (J.App. at 252-53).

The record also reveals other occasions where township officials were specifically advised in advance of the tenant's proposed use of the property as a sports club with 25 billiard tables. For instance, Patlakh submitted an application to the Mercantile Division of the Department of Licenses and Inspection seeking a license to operate 25 billiard tables at the center. (J.App. at 220, 254). Subsequently, a permit was issued allowing operation of the tables and acknowledging payment of the tax of *$75 per table for 25 billiard tables.* (J.App. at 222-23, 256-57).

Additionally, Patlakh and Price attempted to submit an application for a sign for the business to be known as "Billiards Sports Club."[4] Moreover, Robert Welsman, the Building Inspector, whose job it is to notify Phillips if a use is not consistent with the permit use, was inside the property on several occasions after the tables were substantially assembled. (J.App. at 198-99, 343A).

The deposition testimony clearly reveals that Phillips and through him, the Township, knew that plaintiffs planned a sports club containing 25 billiard tables, not a health club, at 3 South State Road when the Township issued the certificates of use. The testimony also shows that the Township concluded that a sports club use with 25 billiard tables could be permitted at 3 South State Road, given the zoning history on the property.

Phillips, the Township's Zoning Officer, himself admits these points:

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[4] The sign application was rejected because the contractor was not licensed by the Township. (*See* J.App. at 258).

Q: By the time you spoke to Nancy White, you had already known that the sport club had 25 pool tables in it, didn't you?

A: No, I only knew that a permit was issued. I didn't know they were in there.

Q: But you did know a permit was issued allowing the operation of 25 pool tables in that area.

A: Yes, that's right.

(J.App. at 225).

Q: So you understood that the use they were going to have at the sports center was going to be different than the health club use.

A: Different than the health club, yes.

Q: Was it your understanding that nevertheless the sports center use could be permitted?

A: Yes.

(J.App. at 211).

Q: Mr. Phillips, did you tell the (Township Solicitor) Ackerman that you were under the impression that the use was going to basically be a continuation of the prior use, a gym, or fitness center, or Nautilus workout type place?

A: No, I don't remember saying that.

Q: Do you remember telling Mr. Ackerman that you understood – strike that question. Do you remember whether or not you told Mr. Ackerman that you understood the use to be a sports club?

A: Yes.

Q: You did tell him that?

A: Yes.

Q: Did you tell Mr. Ackerman that you had concluded that a sports center use on the second floor of 3 South State Road property could be permitted?

A: Yes.

Q: Mr. Ackerman also testified in his deposition on Pages 104 and 105 that he believed that no

billiard tables were permitted at this location. Did you tell him that?

A: No.

(J. App. at 242-43).

Notwithstanding the Zoning Officer's conclusion that a sports club with 25 billiard tables was permitted at 3 South State Road and his issuance of permits allowing the use, the use permits were summarily revoked as described below. On January 7, 1991, after appellants had expended substantial sums of money readying the property for the sports club use (J.App. at 178-81). The building was inspected for compliance with the various township code requirements and ordinances. The township fire marshall and plumbing inspector indicated that the building passed inspection. The township health inspector imposed several additional requirements for approval, all of which were completed by January 15, 1991. (J.App. at 187A and 187B). At no time did the Township issue any citations for code violations. Although occupancy permits were never issued for the property, the record shows that the reason occupancy permits were not issued was because the use permit had been revoked. (J.App. at 269).

The discovery reveals that in the morning or early afternoon of January 8, 1991, the police came to the sports center and told Patlakh that the "Mayor's Office" wanted him to close the center. (J. App. at 288-89).[5] After Patlakh informed Price of the problem, Price then telephoned Alvin Ackerman ("Ackerman"), Township Solicitor for Upper Darby Township and asked if he could find out what was going on. About two hours later, Ackerman telephoned Price and told her to meet him in the Mayor's Office at 3:00 p.m. (J.App. at 107). After arriving 20 minutes late for the meeting and waiting in the reception area for another 25 minutes, (J.App. at 103-04),

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[5] Patlakh opened for business on January 8, 1991 before all the equipment was in place, and before the Township had issued an occupancy permit. The Taylor plaintiffs did not know that Patlakh had opened without his occupancy permit, and learned this only after the Township closed Patlakh down. Patlakh opened the club even though all the equipment was not in the place because under his lease agreement with Taylor, his rent commenced on January 8, 1991.

Price was stunned to be confronted by an array of township officials when she entered into the Mayor's office including: Mayor Ward, Raymond Shay, the Township Chief Administrative Officer; Mario Civera; Richard Gentile, a member of the Township Council; Nancy White, the council-member in whose district the 3 South State Road building is located; Ackerman; Phillips and at least one or two other individuals, (J.App. at 107-108).

The meeting commenced with Solicitor Ackerman announcing that the Township was revoking the use permit because the plaintiffs had submitted a false and misleading application for the permit. (J.App. at 105-106). Ackerman went on to say that Township Officials, particularly Phillips, were *intentionally misled* by the wording of the application and that Phillips had believed that the use of the property was going to be a health club. (App. at 302-303).[6]

Ackerman appeared to be unaware that a certificate of use was issued based on an application describing the use as including 25 pool tables. He was also unaware that plaintiffs had paid for and received a mercantile license to operate the 25 billiard tables. (J.App. at 297-98, 299, 301, 309). Ackerman made reference to plaintiffs' having violated an hours of operation restriction placed on the property, a restriction that Price had no knowledge of prior to the meeting in the Mayor's Office. Price was not shown the documents that were alleged to be misleading nor was she shown the document that supposedly contained the hours restriction on it. (J.App. at 109-110).

After that meeting, statements to the effect that the owners had filed a false and misleading application for a certificate of use were repeated by Ackerman at a public meeting and were picked up by the press. (J.App. at 340).

Defendants' own testimony reveals that the decision to revoke the permits was not made by Phillips, the Zoning

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[6] Ackerman testified in his deposition that Phillips told him that he was "under the impression that it was going to be a continuation of the prior use, a gym or fitness center or nautilus workout-type place." (J.App. at 302-306). Phillips denies that he told Ackerman this. (J.App. at 242.)

Officer with the power and authority to do so (after utilizing the procedural protections mandated by the Municipalities Planning Code), but rather, was made by the Mayor, supposedly based wholly on the advise of Ackerman, the Township Solicitor. (J.App. at 235-36, 239-40, 322-23, 307). The evidence further reveals that all of the defendants and John McNichol the leader of the Republican Party in Delaware County jointly participated in the decision. (J.App. at 103-104, 116-117, 317-318). Finally, revocation of the permits was not preceded by the Township's sending an enforcement notice as required by the Municipalities Planning Code.[7]

The reason given by the Township to justify the belated revocation of the use permits was mere pretext for the true

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[7] Article VI of the MPC provides in pertinent part:

Section 10616.1 Enforcement Notice.

a. *If it appears to the municipality that a violation of any zoning ordinance enacted under this act or prior enabling laws has occurred, the municipality shall initiate enforcement proceedings by sending an enforcement notice as provided in this section.*

b. The enforcement notice shall be sent to the owner of the record of the parcel on which the violation has occurred, to any person who has filed a written request to receive enforcement notices regarding that parcel, and to any other person requested in writing by the owner of the record.

c. *An enforcement notice shall state at least the following:*

(1) The name of the owner of record and any other person against whom the municipality intends to take action.

(2) The location of the property in violation.

(3) The specific violation with a *description of the requirements which have not been met,* citing in each instance the applicable provisions of the ordinance.

(4) *The date before which the steps for compliance must be commenced and the date before which the steps must be completed.*

(5) That the recipient of the notice *has the right to appeal to the zoning hearing board* within a prescribed period of time in accordance with procedures set forth in the ordinance.

(6) That failure to comply with the notice within the time specified, unless extended by appeal to the zoning hearing board, constitutes a violation, with possible sanctions clearly described.

53 P.S. Sec. 10616.1 (1991). (Emphasis added).

As the statute itself says: this notice was the *very minimum*

motivation.[8] The, evidence reveals that the permits were revoked because of political pressures exerted by the neighborhood on Nancy White and the Township Council, which were in turn motivated by improper racial concerns. The record also reveals that the permits were revoked because of personal animosity by Township officials for the Duffy family, and because the Duffys had bucked the system by defying John McNichol. Whether or not the permit applications were false and misleading had nothing to do with it. (J.App. at 116-117, 121-122, 126-127, 196-197, 320).

As a direct and proximate result of the revocation of the two use permits issued with respect to the second floor of 3 South State Road, VGM terminated its lease with Taylor under a provision in the lease that allowed it do so. Because of the termination of VGM's lease, Taylor can prove damages under two alternative theories: lost profits in the amount of $1,000,000.00 from the sale of the building that did not go through after Patlakh terminated his lease; or lost rent under lease term and the renewal term in an amount in excess of $1.2 million. (J.App. at 204-205).[9]

Taylor also developed uncontroverted evidence of loss of over $40,000.00 in unrecoverable construction costs. (J.App. at 200-201). Additionally, discovery showed that Price spent at least 100 attorney hours in connection with the specific use, including: preparation of the applications for certificates of use, application for a mercantile license, negotiations over prorating the mercantile license, negotiations of the lease and

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[8] Because District Judge Broderick disposed of this case on ripeness grounds, the evidence supporting plaintiffs' claims that the revocation was based on improper racial and political motivations will not be detailed here. A full factual exposition of these claims is set forth in the Memorandum of Law of Plaintiffs Taylor Investment, Ltd., Colleen Duffy Price and James P. Duffy in Opposition to Defendants' Motion for Summary Judgment at pp. 23-29. The Appendix filed therewith collects, in one document, all of the evidentiary support offered in opposition to defendants' Motion for Summary Judgment (See District Court Dkt No. 36).

[9] A more detailed statement of the evidence supporting appellants' damages can be found in Plaintiffs' Memorandum submitted to the Trial Court below at pp. 29-31.

amendments, preparation and review of the construction documents and numerous efforts to mitigate damages by reletting the premises to another tenant. (J.App. at 204-205).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions raised herein were raised in the trial court. The trial court granted summary judgment. Issues raised herein were raised on direct appeal to the Third Circuit. A Panel of the Third Circuit affirmed the grant of summary judgment by the trial court.

The issues raised herein were raised on Petition for Rehearing. A full Third Circuit denied the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I. The lower courts' extension of the *Williamson* ripeness requirement to plaintiffs' substantive and procedural due process claims grounded in the revocation of an already-issued permit, is contrary to the Supreme Court's decision in *Patsy v. Florida Board of Regents* because here, plaintiffs challenge the constitutionality of defendants' conduct, not the constitutional rationality of the zoning regulations as applied to plaintiffs' property.

The *Williamson* ripeness requirement applies in cases, like *Williamson*, where a plaintiff challenges the constitutionality of zoning regulations *as applied* to plaintiff's property – whether those claims are couched in terms of a "taking", a deprivation of due process, or a denial of equal protection. On the other hand, where plaintiff challenges governmental *action* distinct from the regulation itself, the special ripeness requirement of *Williamson* has not been applied.

It makes perfect sense to apply the special ripeness requirement of *Williamson* in the context where plaintiff challenges the constitutionality of regulations as applied to his

property (an "as-applied" challenge). As the Supreme Court stated in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986), a court must know the "nature and extent of a permitted development before adjudicating the constitutionality of regulations that purport to limit it." In the "as-applied" context, application for a variance is a required prerequisite to constitutional review because if variances are granted permitting the development, plaintiff's constitutional challenge may disappear. Thus, in that context, the imposition of the requirement to seek a variance serves one of the ends of the ripeness requirement: avoiding unnecessary constitutional decisions. *See* 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, *Jurisdiction* Sec. 3532.1 at 115 (2d ed. 1984).

By the same token, it makes perfect sense *not* to impose the *Williamson* ripeness requirement in cases where the constitutional claim is *not* that the application of a challenged regulation deprives plaintiff of his constitutional rights. Where the inquiry focuses on the constitutionality of governmental *conduct* apart from the regulation, resolution of the constitutional question does not rise or fall on whether a particular use will be permitted. As issuance of the variances would not be determinative of constitutional question, an appeal of the decision to the Zoning Hearing Board is not a prerequisite to asserting a ripe claim.

Refusing to recognize the distinction between "as applied" challenges, and challenges to governmental acts, as the trial court and Third Circuit did here, undermines the Supreme Court's rationale in *Patsy v. Florida Board of Regents*. In *Patsy*, the court held that exhaustion of administrative remedies is not a prerequisite to stating a claim under section 1983. If, however, an appeal to the Zoning Hearing Board is required regardless of whether that appeal affects, in any way, the constitutional issue presented for review, then the Court has, in effect, reimposed the exhaustion requirement, rejected in *Patsy*.

Cases which recognize the distinction between "as applied" challenges to zoning regulations (requiring appeal to the Zoning Hearing Board to determine how the regulation

will be applied), and challenges to defendants' conduct (which are ripe for review upon the completion of the offending act), include: *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890, 894-95 (6th Cir. 1991) (City Council's ultra vires intervention into the zoning amendment process "was an act that *in and of itself* inflicted immediate injury on Nasierowski" and was ripe for federal adjudication without requiring Nasierowski to seek relief from the Board of Zoning Appeals); *Harris v. County of Riverside*, 904 F.2d 497, 500-501 (9th Cir. 1990) (deprivation of plaintiff's right to use his property until he paid a non-refundable fee inflicted actual concrete injury which did not depend on the finality of the county's determination of the permissable uses of the property); *P.L.S. Partners v. Cranston*, 696 F.Supp. 788, 795-96 (zoning officer's revocation of building permit inflicted actual concrete injury ripe for adjudication.)

Plaintiffs challenge the following acts of governmental officials:

- Improper intervention of township officials into the zoning process;
- Revocation of already issued permits without prior notification of the violation and an opportunity to cure;
- Circulation of defamatory statements about plaintiffs;
- Altering documents; and
- Race-based decision-making.

These activities, like those in the *Nasierowksi* and *Harris* cases, have been completed and have inflicted concrete constitutional injury on plaintiffs. To require an appeal to the Zoning Hearing Board (which appeal would not address the propriety of these actions) is simply another way of requiring exhaustion. Thus, the Panel's decision to require an appeal to the Zoning Hearing Board where already-issued permits have been revoked under the circumstances alleged above is contrary to controlling precedent in *Patsy*.

The Special Ripeness Requirement developed by the Supreme Court in *Williamson Township Planning Commission v. Hamilton Bank* has been imposed where plaintiffs challenge the constitutionality of regulations as applied to their property, but has not been imposed in other cases involving land use development.

Just because a section 1983 action involves, in some way, land use planning, does not mean that the special ripeness requirement developed by the Supreme Court in *Williamson* is applicable. To the contrary, the federal courts have invoked *Williamson* to require a plaintiff to seek a variance as a prerequisite to asserting the ripe claims only in those cases where the issuance of the variance bears on the determination of the constitutional claim.

In *Williamson*, plaintiff asserted that the application of certain zoning regulations to its property had the effect of depriving it of all economically viable use of the property and amounted to a "taking" in violation of the Fifth Amendment, and a deprivation of due process in violation of the Fourteenth Amendment of the United States Constitution. 473 U.S. at 172. Because the constitutionality of the challenged regulations could not be ascertained until the nature and extent of the development permitted by the regulations was determined, the *Williamson* court ruled that plaintiffs' claims were not ripe until plaintiffs applied for variances from the regulations to determine the ultimate permitted use. *Id.* at 194, 200. The reasoning in *Williamson* was premised on the fact that had a variance been allowed permitting the development that plaintiff claimed was denied it, plaintiff's "as applied" challenge to the regulations would disappear. *Id.* at 199-200. (resolution of the constitutional issue depends, in significant part, on whether a variance was granted, and how that action affects the value of respondent's property and his investment-backed profit expectations). This rationale, of course, is one of the bases underpinning the ripeness doctrine: avoidance of unnecessary constitutional adjudication.

The goal of avoiding unnecessary constitutional adjudication is the driving force behind the *Williamson* rationale and

the principle behind the various federal courts' application of the *Williamson* ripeness requirement to the cases before them. As in *Williamson*, where plaintiff is asserting an "as-applied" challenge to zoning regulations, applications for variances are required in order for the court to determine how the challenged regulations would ultimately be applied to the property. Resolution of the issue favorably to plaintiff may avoid the need for constitutional adjudication. Where, on the other hand, plaintiff is not asserting an "as-applied" challenge to zoning regulations, but rather attacks the conduct of government officials apart from regulations, or makes a facial challenge to the regulations (i.e. that the very act of adopting the regulation works some constitutional deprivation), the courts have not applied the special ripeness requirement of *Williamson*. In these cases, because plaintiff's constitutional claims survive independently of the variance process, resolution of the variance issue will not avoid the need for constitutional adjudication. Thus, the claims are ripe without reference to a variance.

In *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), plaintiffs' challenge to the acts of governmental officials rather than to the effect of various regulations on his property, were ripe without the requirement of seeking a variance. Therein, plaintiff, who wished to construct a warehouse on a particular parcel of property, purchased the property in reliance on the City's specific representation that such development would be permitted. After his purchase, the City issued a preliminary site plan approval, conditioned upon plaintiffs' undertaking, at his personal expense, the design and construction of certain improvements to the public roads accessing the development. *Id.* at 891.

While plaintiff was engaged in the process of negotiating with the city to obtain the variance, the City's planning commission drafted legislation for the adoption of a new citywide master zoning plan. As the proposed plan would not have adversely impacted plaintiff's development of his parcel, plaintiff did not attend the public hearings on the proposed plan nor comment on it. *Id.* at 892.

After the public hearings on the plan, the city council convened an executive session. While at the inception of the meeting, it appeared that the council was ready to adopt the proposed zoning ordinance as recommended by the planning commission *in toto*, Councilmember Rice succeeded in inserting an amendment to the plan, which effectively rezoned a narrow strip of land encompassing plaintiffs' property to a more restrictive classification that permitted only office use. The amended ordinance was passed by Council, *Id.* at 892-93. Relying on the newly adopted zoning ordinance, the city rescinded the previously issued preliminary site plan approval, totally aborting plaintiffs' project. *Id.* at 893.

Without applying to the city Board of Zoning Appeals for a variance from the newly enacted zoning restrictions, plaintiff commenced a suit in federal court alleging, among other things, that he was denied procedural due process in violation of his Fourteenth Amendment rights when council convened an executive session and amended the zoning plan without affording plaintiff notice and an opportunity to be heard. *Id.* Relying on *Williamson*, the district court granted the city's motion for summary judgment, concluding that plaintiffs' constitutional claims were not ripe because he had failed to seek a variance from the Board of Zoning Appeals. The Sixth Circuit reversed. *Id.* at 895.

In reaching its conclusion, the Sixth Circuit noted that under *Williamson*, "the type of claim is crucial to determining whether finality is required." *Id.* at 894, *citing*, *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989). In cases where the injury arises from "the infirmity in the process" itself, neither an application for a variance nor exhaustion of administrative remedies is required. *Id.* The Court noted a distinction between cases where constitutional injury occurs immediately upon a performance of an illegal act and cases where constitutional injury cannot be ascertained until the municipality arrives at a final decision as to how a property owner will be permitted to develop his property. *Id.* at 894. In the *Nasierowski* case, the court reasoned that plaintiff's injuries accrued and attached immediately when council convened

an executive session and materially deviated from the recommendation of the planning commission, thus committing an *ultra vires* act. *Id.* at 894. As the Court explained:

> Because the council's passage of the new zoning ordinance with Rice's amendment was an act that *in and of itself* inflicted immediate injury on Nasierowski, the procedural due process claim was ripe for federal adjudication without requiring Nasierowksi to first seek relief from the city's Board of Zoning Appeals.

Id. at 895. (Emphasis in original).

The results in *Nasierowski* can be simply explained by the observation that even if the Board of Zoning Appeals ultimately granted a variance allowing the development of the property as he originally proposed, his constitutional rights to procedural due process would nevertheless still have been violated by the council's illegal, *ultra vires* acts. Application of the *Williamson* ripeness requirement would not have served the function of avoiding unnecessary constitutional adjudication.

A similiar situation occurred in *Harris v. County of Riverside*, 904 F.2d 497, 500-501 (9th Cir. 1990). Therein, plaintiff alleged that by rezoning his property as a residential zone, and by imposing bureaucratic roadblocks to his ability to comply with county land use procedures, the county took plaintiff's property in violation of his Fifth Amendment rights and his Fourteenth Amendment rights to substantive and procedural due process. *Id.* at 498. Because resolution of Harris' procedural due process claims did not require a final and authoritative determination of the development permitted on his land, the court ruled that the *Williamson* ripeness requirement did not apply, and that his claim was ripe without the requirement that Harris seek the amendment to the plan:

> Harris alleges that the County denied him procedural due process by depriving him of the commercial use of his land until he paid the $2,400 to $3,000 non-refundable fee it charges to apply for an amendment to the general plan . . . *The fee and the deprivation of the commercial use of this land*

> *amount to actual concrete injuries which are separate from any taking Harris may have suffered. These injuries have already occurred and do not depend on the finality of the County's determination of the permissable uses of its property.* Therefore, because Harris' procedural due process claim does not directly arise from, or rely on, his takings claim, we hold that it is not subject to the ripeness constraints applicable to regulatory takings and we may review it.

Id. at 501. (Emphasis added).

Using similiar rationale, the Tenth Circuit in *Landmark Land Co. of Oklahoma v. Buchanan*, 874 F.2d 717 (10th Cir. 1989) refused to apply the special ripeness requirement of *Williamson* to some of the claims before it. Therein, although the court dismissed plaintiffs' takings claim, its substantive due process claim and its equal protection claim as unripe for failure to apply for a variance, it permitted plaintiff to proceed on its procedural due process claim, reasoning that:

> If Landmark had a property interest in those specific permits, however, Del City could not withhold them without affording Landmark due process. Thus, Landmark's procedural due process claim may not be dismissed as unripe.

Id. at 723.

The Court also observed a distinction between the type of equal protection claim that requires a final local decision in order to be ripe and the type that does not:

> Since Del City's actions do not affect a suspect class or a fundamental right, they must be reviewed under an arbitrariness standard. The final local decision which must be reviewed for arbitrariness is a decision to allow a particular level of development. That level must also be compared to that permitted other land owners to determine if plaintiff has been treated differently.
>
> An equal protection challenge to a policy or regulation that facially dictates different treatment for

> specific cases, such as blacks or other minorities, would not present us with the ripeness problems as Landmark's claim. *Such an explicit decision, for equal protection purposes, would be final and reviewable when made.*

Id. at 722-23 n.3. (Emphasis added).

Certainly, in a situation where a land use decision is made on impermissable racial grounds, the constitutional injury occurs at the moment the decision effecting the suspect class is made. Even if the disparate treatment is corrected upon appeal for a variance, the constitutional injury (being treated differently in the first place), would not disappear. Consequently, application for a variance is not required to make the claim ripe. *See also East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning and Zoning Comm'n.* 896 F.2d 1264, 1265 (11th Cir. 1990) (even though due process and takings claims were dismissed under *Williamson* for failure to seek a variance, the Court reached plaintiff's equal protection claim on the merits).

P.L.S. Partners v. Cranston, 696 F. Supp. 788, 795-96 (D.R.I. 1988). which was extensively discussed in appellant's Opening Brief at pp. 33-36, illustrates the situation where plaintiff's claim of constitutional injury arising from the conduct of governmental officials, as opposed to the application of the land use regulations to them, is not affected by the *Williamson* ripeness requirement. In that case, after a permit allowing the construction of an abortion clinic has been issued to the plaintiff, the building inspector revoked the permit, characterizing the clinic as a hospital, and imposing a requirement on the plaintiff to seek a special exception in order to continue with the project. *Id.* at 790-91. Without seeking the special exception, plaintiff filed a cause of action in federal court under 42 U.S.C. Section 1983. *Id.* at 792.

Even though plaintiff may have been permitted to continue with the construction of the clinic had it sought the special exception, that court ruled that plaintiff's claims were nevertheless ripe for judicial review:

> In this case, however, plaintiff's substantive due process challenge focuses exclusively on the decision by the building inspector that the proposed use required a special permit in the first place. They contend that this decision erects artificial and gratuitous obstacles in the path of a woman's right to obtain an abortion, thereby infringing on privacy rights. It is this act of the inspector, this characterization of the women's center as a hospital requiring special dispensation from the zoning board, that inflicts, as they see it, an actual concrete injury ripe for adjudication. Accordingly, this court holds that the *Williamson* ripeness doctrine does not apply . . .

Id. at 796.

The language used by the *P.L.S.* court to explain why the *Williamson* ripeness requirement was not applicable to the claims before it is almost identical to the language used by the Sixth Circuit to arrive at the same conclusion in *Nasierowski v. City of Sterling*, described above. In *Nasierowski*, because passage of the ordinance rezoning plaintiffs' property was "an act that in and of itself inflicted immediate injury" on plaintiff, the plaintiff was not required to seek a variance. 949 F.2d at 895. Similarly, in *P.L.S.* the actions of the building inspector in requiring the plaintiff to apply for special dispensation from the Zoning Hearing Board was an act that inflicted actual concrete injury ripe for adjudication. Whether or not a variance was granted, the plaintiffs in those cases suffered constitutional injury. Unlike *Williamson*, and other "as-applied" challenges, the issuance of the variance would not undermine the constitutional claim.

This distinction, between a challenge to the act of a governmental official, which is ripe for judicial review upon completion of the offending act, and a challenge to the application of regulations to plaintiff's property, which is not ripe until the regulations have been applied through the variance process, explains the difference between the various federal courts' treatment of facial challenges concerning ordinances and its treatment of "as-applied" challenges. As noted above, an "as-applied" challenge to a zoning ordinance is not ripe

until plaintiff, through the variance process, obtains a final determination of how the purportedly unconstitutional regulation will be applied to the property. Facial challenges, however, are not subject to the same ripeness requirement. *See Beacon Hill Farm Associates II Ltd. v. Loudoun County Sup'rs*, 875 F. 2d 1081, 1084 (4th Cir. 1989), and cases cited therein, (the Supreme Court has recognized as recently as 1987 that a landowner may mount a facial attack on a land use regulation without first seeking a final determination of how the applied regulation will affect actual use of the property). *citing, Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). *See also Eide v. Sarasota County*, 908 F.2d 716, 724 n. 14 (11th Cir. 1990) *cert. denied*, 111 S. Ct. 1073 (1991) (the *Williamson* ripeness requirement does not apply when a land owner makes a facial challenge to a regulation). The reason for this distinction derives once again from the nature of the constitutional inquiry. While an "as-applied" challenge rests on a claim that the impact of governmental regulation causes constitutional injury, a facial challenge derives from a claim that the mere enactment of the statute is unconstitutional. *Beacon Hill*, 875 F.2d at 1083. *See also Eide*, 908 F.2d at 724 n.14. As the viability of a facial challenge does not depend on the ultimate use to which the property may be put, there is no requirement to see how a property may be used as a prerequisite to bringing a challenge. *See Southern Pacific Trans. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990) (when claim is that mere adoption of the ordinance violated the due process equal protection clauses, neither the finality nor the just compensation ripeness requirements applies to such federal challenges). *See also Crow-New Jersey 32 Ltd. Partnership v. Township of Clinton*, 718 F.Supp. 378, 382 (D.N.J. 1989) (the Supreme Court has recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that a particular impact of a governmental action on a specific piece of property requires the payment of just compensation).

The reason underlying the various federal courts disposition of the facial challenges as distinct from the "as-applied"

challenges is the same reasoning that drove the courts' decisions in *Nasierowski*, *Harris*, *P.L.S.* and the other cases cited above. In the facial challenge cases, the claim is that the mere enactment of a statute causes constitutional injury. That act is an act which in and of itself inflicts the injury. Like the act of the township council in *Nasierowksi*, and the building inspector in *P.L.S.*, the suspect action has been completed and is ripe for judicial review. There is no requirement to apply for a variance because the receipt of a variance will have no effect on whether or not there is a constitutional violation in the first instance.

Each of the cases cited above, including the cases cited by defendants,[10] falls into the developing pattern of the law described above – except for one – the Third Circuit's decision in *Midnight Sessions v. City of Philadelphia*. As the defendants read the *Midnight Sessions* decision, even if Down South could prove (which it did to the jury's satisfaction) that the City of Philadelphia arbitrarily and irrationally cited it for building and fire code violations solely for the purpose of driving it out of business, Down South was nevertheless required to appeal the citations as a prerequisite to stating

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[10] *See e.g. Eide v. Sarasota County*, 908 F.2d 716, 720, 727 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991) (applying the *Williamson* rationale in the context of four different "as-applied" challenges, but recognizing the existence of situations where a claim is ripe upon completion of a single arbitrary act); *Traweek v. City and County of San Francisco*, 920 F.2d 589, 591 (9th Cir. 1990) (applying the *Williamson* ripeness requirement to "as-applied" challenge); *Southern Pacific Trans. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990) (dismissing "as-applied" challenges to regulatory takings based on the just compensation clause, the due process clause and the equal protection clause, but retaining facial challenges that the adoption of the ordinance violated due process and equal protection); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (final decision requirement applicable to substantive due process and equal protection claims brought to challenge to the *application* of land use regulations); *Gilbert v. City of Cambridge*, 932 F.2d 51, 65 (1st Cir.), *cert. denied*, 112 S. Ct. 192 (1991) (dismissing facial and "as-applied" takings claims but reaching the asserted violations of the due process and equal protection clauses on the merits). *But see Unity Ventures v. Lake County*, 841 F.2d 770, 775 (7th Cir.) (claim of arbitrary denial of sewage connection not ripe without a formal application for the connection), *cert. denied, sub nom, Alter v. Schroeder*, 488 U.S. 891 (1988).

claims that were ripe for judicial review. This makes no sense. In *Midnight Sessions*, the Down South plaintiff was not challenging the constitutionality of regulations as applied to its property, but rather was concerned with the unconstitutional conduct of city officials. The question of what use the property could ultimately be put to was not relevant to a determination of the constitutional claim that the City of Philadelphia drove it out of business. If it were indeed true that the City of Philadelphia used its police power in an attempt to drive Down South out of business, Down South's constitutional rights would be violated regardless of whether any or all of the citations were eventually overturned. Requiring appeal of the citations then would not serve the purpose for which the variance requirement was imposed in *Williamson:* the avoidance of unnecessary constitutional adjudication. Consequently, there is no reason why plaintiff should have been required to appeal the citations prior to stating claims that were ripe for judicial review.[11] In the instant case, petitioners were given no notice of appeal.

It is important to note at this juncture that the *Midnight Sessions* case did not address the impact of the *Williamson* ripeness requirement on Down South's procedural due process and equal protection claims. This Court disposed of the procedural due process claim on the merits, holding that Down South did not have a property interest in the dance hall license it sought. Similarly, the *Midnight Sessions* case provides no guidance as to how this Court would apply the

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[11] Petitioners argued in their Third Circuit brief that this Court's decision in *Midnight Sessions* was actually motivated, not by the *Williamson* rationale, but by a garden-variety ripeness concern: Down South's claim that it had arbitrarily and irrationally been denied its dance hall license was not ripe because it could not show that it had met the prerequisites for getting the license in the first place: no outstanding citations. If that is the case, then the *Midnight Sessions* decision is inapposite to the situation here, where plaintiffs already had use permits, which were later revoked by the acts of Upper Darby officials. See Opening Brief at 27-28.

Williamson ripeness requirement in a situation where plaintiffs assert an equal protection claim based on disparate treatment motivated by improper racial considerations. Those claims were disposed of below and did not reach this Court.

In short, if defendant's reading of the *Midnight Sessions* case is correct, the Third Circuit's dismissal of Down South's substantive due process claim is not compelled by *Williamson*, is out of sync with an analytical approach being developed amoung the circuits and is not in keeping with traditional notions of ripeness.

In the case at bar, this Court should grant certiorari to resolve the conflict among the circuits which this case creates and should decide to treat plaintiffs' claims consistently with the rule emerging among the other circuits and should refuse to apply the *Williamson* ripeness requirement to these claims.

II. The lower courts' Extension of the *Williamson* Rationale to a Case Where Plaintiffs have alleged and shown that they were divested of a property right based on a racially discriminatory intent to prevent black patrons from doing business in the Township, is contrary to the Supreme Court's decisions in *Patsy v. Florida Board of Regents, Sullivan v. Little Hunting Park,* and *Arlington Heights v. Metropolitan Housing Corp.*

Even though plaintiffs are not black they nevertheless have standing to assert claims for a denial of equal protection of the laws, due to defendants' racially discriminatory conduct. *See Sullivan v. Little Hunting Park,* 396 U.S. 229 (1969) (white person who is punished for vindicating rights of blacks has standing to maintain race-based on equal protection challenge); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 174 (1970) (white person who could show that defendants' refusal to serve her was based on a state enforced custom of segregation could maintain action under 1983); *Scott v. Greenville County,* 716 F.2d 1409, 1415-16 (4th Cir. 1983) (plaintiff could maintain race-based equal protection claim where he could show that he was singled out for adverse treatment

because he was willing to contract with and associate with blacks); *Des Vergnes v. Seekonk Water District*, 601 F.2d 9, 15 (1st Cir. 1979) (white housing developer has standing to sue a water district under Sec. 1983 for racially discriminatory denial of water line access, even though the developer was not a member of a minority); *Riccobono v. Whitpain Township*, 497 F.Supp. 1364 (E.D. Pa. 1980) (plaintiff had standing to assert race-based equal protection claims where he alleged that defendants denied him a building permit for a roller skating rink because they feared that the rink would bring blacks into their community).

It is axiomatic that a claim of racially-based denial of equal protection is subject to strict scrutiny. As the above cases show, so long as the offending conduct is motivated by race, it does not matter whether the plaintiff is white or black. What the Court seems to suggest in its Opinion at page 22, (App. at 34a), however, is that even if the initial decision of the Township Officials to revoke the permit was motivated by invidious racial discrimination, so long as the Zoning Hearing Board could find a rational relationship between the revocation decision and a legitimate township purpose, there is no constitutional violation. This is not a correct statement of the law. *Village of Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252, 265-66 (1977) (where racially discriminatory purpose has been a motivating factor in a decision, the equal protection clause is implicated).

Where a land use decision is made on impermissable racial grounds, the constitutional injury occurs at the moment the decision is made. *See e.g. Landmark Land Co. of Okl. v. Buchanan*, 874 F.2d 717, 722-23 n.3 (10th Cir. 1989) (recognizing that a zoning decision based on race would be final and reviewable when made). Even if the disparate treatment is corrected upon appeal for a variance, the constitutional injury (being treated differently in the first place), would not disappear. Thus, defendants' actions here, revoking a permit based on improper racial motivations, amounted to a completed constitutional tort which was ripe for judicial review the moment the decision was made. To require an appeal to the Zoning Hearing Board, simply for the sake of inserting

another level of review, and not because a decision by the Zoning Hearing Board is a necessary prerequisite to determining whether there is a constitutional claim in the first place, is tantamount to reimposing the exhaustion requirement rejected in *Patsy v. Florida Board of Regents.*

III. The lower court erred in concluding that plaintiffs' procedural due process claims were not ripe for review where defendants' revocation of an already-issued permit inflicted immediate constitutional harm on plaintiffs.

In keeping with the distinctions referred to above between "as applied" challenges to zoning ordinances (requiring the application of *Williamson*) and challenges to governmental actions inflicting an immediate constitutional injury (which do not), Courts have refused to impose the *Williamson* ripeness requirement to cases alleging deprivation of *procedural* due process rights. These cases include *Nasierowski*, 949 F.2d at 894-95, and *Harris*, 904 F.2d at 500-501. *See Bigelow v. Michigan Department of Natural Resources*, 970 F.2d 154, 160 (6th Cir. 1992) ("*Nasierowski* appears to stand merely for the sensible proposition that while different circumstances may produce different results, *the final decision rule does not apply when the denial of procedural due process itself creates an injury.*") (Emphasis added).

In this case, defendants *revoked permits already issued* to plaintiffs. Prior to the revocation, defendants were required by Pennsylvania Law to send an Enforcement Notice to plaintiffs detailing the alleged violation, and providing plaintiffs with an opportunity to cure. Instead, defendants violated the law by summarily revoking the permits without affording these protections.

It is undisputed that plaintiffs were entitled to pre-deprivation procedures which were not afforded to them. *Where pre-deprivation procedures are constitutionally required, affording post-deprivation remedies does not cure the constitutional violation. Logan v. Zimmerman Brush Co.*, 455 U.S.

422, 436 (1982); *Stana v. School District of City of Pittsburgh*, 775 F.2d 122, 128-30 (ed. Cir. 1985).[12] Thus, where as here the Township took away the plaintiffs' right to operate the property without affording plaintiffs' notice of the alleged violation, an opportunity to present their side of the story and an opportunity to bring the property into compliance as required by Pennsylvania Law, they inflicted concrete constitutional injury on plaintiffs.[13]

CONCLUSION

Petitioners pray that the Petition for Writ of Certiorari be granted.

J. MICHAEL FARRELL, ESQUIRE
Attorney for Petitioner

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[12] Neither *Williamson* nor *MacDonald* cited by the Panel on p. 20 of the Opinion concerned an allegation that the government failed to follow state mandated procedures. The Panel's Opinion characterizes the *Williamson* case as one asserting a procedural due process claim. p. 19. With all due respect to the Panel, we disagree. In *Williamson*, plaintiffs' claim was that the regulation, as applied to the property, was so onerous as to be an invalid exercise of the police power. *Williamson*, 473 U.S. at 199. Such a claim is not one challenging statutory procedure, but asserts a ***substantive*** challenge that the statute is irrational.

[13] While the panel alludes in several places to the fact that plaintiffs would not have operated the property because they did not have an occupancy permit, ***the record is clear that plaintiffs were not given an occupancy permit because the use permit was revoked***. Thus, it was the revocation of the use permit that prevented plaintiffs from occupying the property.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TAYLOR INVESTMENT LTD., COLLEEN DUFFY PRICE AND JAMES P. DUFFY,	:	Civil Action
Plaintiffs,	:	
v.	:	
UPPER DARBY TOWNSHIP, DONALD C. PHILLIPS, JAMES J. WARD, RUDOLPH D'ALESIO, MARIO CIVERA AND NANCY WHITE	:	
Defendants.	:	No.: 91-1575

VGM CORPORATION AND GREGORY PATLAKH	:	Civil Action
Plaintiffs,	:	
v.	:	
UPPER DARBY TOWNSHIP, DONALD C. PHILLIPS, JAMES J. WARD, RUDOLPH D'ALESIO, MARIO CIVERA AND NANCY WHITE	:	
Defendants.	:	No.: 91-2910

MEMORANDUM AND ORDER

BRODERICK, J. FEBRUARY 26, 1992

Defendants have filed a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(c).

Defendants assert that they are entitled to summary judgment because Plaintiffs' claims under 42 U.S.C. §§ 1981, 1982 and 1983 present no genuine issue of material fact and Defendants are entitled to judgment as a matter of law. *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Defendants also question this action's justiciability under the doctrine of ripeness. Because this Court agrees with Defendants' argument that this case is not ripe for judicial review, we will not reach the merits of the §§ 1981-1983 claims.

Plaintiffs Colleen Duffy Price ("Price") and James P. Duffy ("Duffy") own and lease a property located in Upper Darby Township, Pennsylvania, known as 3 South State Road (the "property"). This property was located within a district zoned C-1 by the Upper Darby Township Zoning Regulations.[1] Before Plaintiffs purchased the property, it was last used as a health and fitness club, operating under a special exception granted by the zoning hearing board of Upper Darby. It appears that Plaintiffs' intent was to procure a tenant who would operate a facility either in compliance with C-1 regulations or as a continuation of the previous non-conforming use.

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[1] Section 501 of the Upper Darby Township zoning regulations classifies C-1 as "Neighborhood Commercial Districts . . . to make provisions in appropriate locations for convenience type commercial and service uses primarily to meet the needs of individuals living in the immediate neighborhood of the C-1 Districts." Primary uses, for example, includes such stores as groceries, pharmacies, variety stores, bakeries, funeral homes, day care centers, beauty shops, tailors, jewelers, laundries, offices, banks and real estate offices.

Plaintiff Gregory Patlakh ("Patlakh") allegedly approached Plaintiffs Duffy and Price desiring to open a sports club and fitness center at the property. Patlakh indicated that the center would contain indoor golf, basketball, billiards and baseball games.

On August 1, 1990, upon application by Plaintiffs, a Certificate of Use was issued by the Upper Darby Department of Licenses and Inspection ("L & I"), authorized by Donald Phillips ("Phillips"), the Director of L & I and the Upper Darby zoning officer. The permit was granted to Patlakh for use of a physical fitness/sport center at the property, based on Phillips' assessment that this would constitute a continuation of the nonconforming use previously authorized. Thereafter, on August 10, Plaintiffs Patlakh, Price and Duffy entered into a lease for the operation of Patlakh's sports facility at the property. On September 11, 1990, again upon application by Plaintiffs, a second permit was issued by L & I for Patlakh's sport club, indicating that the club was to include billiards, indoor baseball, hockey and a snack bar.

By January 3, 1991, Patlakh had 25 pool tables, one pinball machine, one video game, a CD (compact disc) jukebox and a foosball (table soccer) table delivered to the property. Patlakh then placed an advertisement in the *News of Delaware County* announcing:

> Grand opening Billiard Sport Club Delaware County's Largest Billiard Club 25 Pool Tables, pin ball machines Open 24 hours, 7 days a week.

Aware of the advertisement, Phillips sent an inspector to the property to report on the property's actual use.

The inspection confirmed the contents of the advertisement, and Patlakh was told not to open for business until certificates of occupancy from the township could be issued since the approved use was not being utilized. As of January 8, 1991, certificates of occupancy had not been issued, yet Patlakh opened for business regardless. Patlakh was then ordered to shut down by the Upper Darby Police.

Following this action, Patlakh contacted Price to inform her of the latter events. Price was then informed by Alvin Ackerman, the Township Solicitor for Upper Darby Township, that a meeting was to be held in Upper Darby Township Mayor James C. Ward's office to discuss the problems arising from the property. At this informal meeting which included all named defendants, Price was informed that the use permits for the property were being revoked. By letter dated January 11, 1991, Phillips formally notified Plaintiffs that the permits previously issued were being revoked due to issuance based on false and misleading applications.

Subsequent to the recision of the permits, Plaintiffs sought no review of Phillips' action or determination by the Upper Darby Zoning Board; nor did Plaintiffs request a variance or make any other application for approval of the property's current use. Instead, this action was filed by Plaintiffs alleging violations of 42 U.S.C. §§ 1981, 1982 and 1983 by Upper Darby Township and the township officials responsible for the revocation of the use permits. More specifically, Plaintiffs claim they have been denied procedural and substantive due process, equal protection,

suffered racial discrimination and interference with contract. Defendants, in addition to addressing all substantive issues in its Motion for Summary Judgment, raise the issue of ripeness, claiming that Plaintiffs' failure to appeal the township officials' action to the zoning hearing board precludes a final administrative determination on the controversy at hand, and therefore, the issues are not ready for judicial review.

The United States Supreme Court has made clear in several recent decisions that issues regarding "the application of government regulations effect[ing] a taking of a property interest [are] not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Co. Regional Planning v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *see also Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297 (1981) (potential for administrative solution by requesting variance confirms conclusion that taking issue was not ripe for judicial resolution).

In *Williamson*, plaintiffs had submitted proposed plats for tract development to the local planning commission, which granted the proposals. Subsequently, the zoning ordinance under which the original plats were approved was altered, and the planning commission decided that further development of the tract should be guided by the new ordinance. The developers brought a § 1983 action alleging that the commission had taken its property without just compensation by refusing to approve the remaining proposals for development. The Court, relying on *Hodel, supra*, held that because the

developer had not sought variances that may have allowed it to develop the property according to its proposals, no final decision had been reached as to the application of the new ordinance to the property, and thus, the claims were premature.

When bringing a § 1983 action, however, there is no requirement that a plaintiff exhaust administrative remedies before bringing suit. Thus, the *Williamson* Court noted that "[t]he question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable." *Williamson*, 473 U.S. at 192. Applying this reasoning, the *Williamson* Court concluded that

> resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine the issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore, is not a final decision.

Id. at 193-94.

This reasoning was recently applied by the Third Circuit in *Midnight Sessions, Ltd., v. City of Philadelphia,*

945 F.2d 667 (3d Cir. 1991). In *Midnight Sessions*, Down South, an after-hours dance club, opened for business without a dance hall license as required by Philadelphia zoning ordinance. Subsequent application for said license was denied by Philadelphia L & I, as was a certificate of occupancy. Neither decision by L & I was appealed. Down South then brought claims against the City of Philadelphia, asserting, *inter alia*, that they had been denied procedural and substantive due process.

The *Midnight Sessions* court held that Down South's substantive due process claims had not ripened for review because Down South

> did not appeal to the Review Board . . . the denial of the certificate of occupancy. This failure to appeal precludes 'final administrative action' by the City and, therefore, these claims were premature and should have been dismissed on summary judgment.

Id. at 686. Being factually comparable and raising similar legal issues, *Midnight Sessions* gives this court much guidance. However, because that case was decided in light of the Philadelphia zoning regulations, we must go beyond that opinion and analyze this case pursuant to the state and local zoning laws applicable to Upper Darby Township.

The Pennsylvania Municipalities Planning Code (MPC), 53 Pa. C.S.A. §10101 *et seq.* sets forth at § 10909.1 the jurisdiction for municipalities' zoning hearing boards. It states, in pertinent part:

> (a) The zoning hearing board shall have exclusive jurisdiction to hear and render *final adjudications* in the following matters:
>
> . . . .

> (3) Appeals from the determination of a zoning officer, including, but not limited to, the granting or denial of any permit, or failure to act on the application therefor, the issuance of any cease and desist order or the registration or refusal to register any nonconforming use, structure or lot.

53 Pa. C.S.A. § 10909.1(a)(3) (emphasis added).

The Upper Darby Township Zoning Ordinance, Article XVI, Section 1600, states in relevant part: "Permits for construction and uses which are a *special exception* or a *variance* to requirements of this Ordinance *shall be issued only upon order of the Zoning Hearing Board.*" (emphasis added). Moreover, Article 1602 of the Ordinance states: "No permit [issued by the zoning officer] shall be considered complete or permanently effective until the Zoning Officer has certified that the work has been inspected and approved as being in conformity with the provisions of this Ordinance and other applicable ordinances."

In this case, the zoning officer, Phillips, issued permits to Patlakh for what Phillips, at that time, thought would be an extension of the nonconforming use previously authorized by the Zoning Hearing Board for the prior occupant (a health and fitness club). Upon an inspection of the premises, Phillips found the property's use not in conformity with either the previous nonconforming use or the C-1 zoning. Phillips' determination was to revoke the use permits based on the current use of the property as conflicting with its authorized uses.

The extent of Phillips' action amounted to a decision of a zoning officer denying a permit (albeit the denial came as a revocation of an issued, though not enforceable, permit). As the reasoning of both *Williamson* and

Midnight Sessions guide this court, it becomes clear that Phillips' refusal to grant fully effective use permits does not determine the issue; it prevents Plaintiffs from using the property as desired without obtaining the necessary exceptions or variances, but leaves open the possibility that respondent may use the property as desired after obtaining exceptions or variances. Thus, Phillips' decision does not conclusively determine whether Plaintiffs will be denied the use of their property, and therefore, is not a final decision.

Under the Upper Darby Township Ordinance, proper procedure would now be to appeal Phillips' determination to the zoning hearing board, seeking a special exception or a variance to the Ordinance's requirements. At that point, a hearing could be granted and an official decision of acceptance or denial would notify plaintiff of the reasons and justifications for such action. *See* 53 Pa. C.S.A. §10908. Only upon receipt of such a final decision by the board could Plaintiffs claim violations of 42 U.S.C. §§ 1981-83, challenging the actions of Upper Darby Township and its officials. Thus, under the reasoning employed by both the United States Supreme Court and the Court of Appeals for the Third Circuit, this court holds that Plaintiffs' have not obtained a final administrative disposition by appealing to the zoning hearing board, precluding judicial review and mandating entry of summary judgment. As *Midnight Sessions* states, "Federal litigation of this kind is not intended to be a substitute for carefully constructed state procedures." *Midnight Sessions*, 945 F.2d at 686.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TAYLOR INVESTMENT LTD., COLLEEN DUFFY PRICE AND JAMES P. DUFFY,	:	Civil Action
Plaintiffs,	:	
v.	:	
UPPER DARBY TOWNSHIP, DONALD C. PHILLIPS, JAMES J. WARD, RUDOLPH D'ALESIO, MARIO CIVERA AND NANCY WHITE	:	
Defendants.	:	No.: 91-1575

VGM CORPORATION AND GREGORY PATLAKH	:	Civil Action
Plaintiffs,	:	
v.	:	
UPPER DARBY TOWNSHIP, DONALD C. PHILLIPS, JAMES J. WARD, RUDOLPH D'ALESIO, MARIO CIVERA AND NANCY WHITE	:	
Defendants.	:	No.: 91-2910

ORDER

AND NOW, this 26th day of February, 1991, upon consideration of Defendants' Motion for Summary Judgment, and for the reasons set forth in this Court's Memorandum of February 26th, 1992;

IT IS ORDERED: Defendants' motion is hereby GRANTED, and judgment shall be entered in favor of Defendants Upper Darby Township, Donald C. Phillips, James J. Ward, Rudolph D'Alesio, Mario Civera and Nancy White and against Plaintiffs Taylor Investment Ltd, Colleen Duffy Price, and James P. Duffy in Civil Action No. 91-1575 and against Plaintiffs VGM Corporation and Gregory Patlakh in Civil Action No. 91-2910, on the ground that Plaintiffs' claims are not ripe for judicial review.

/s/ Raymond J. Broderick
Raymond J. Broderick, J.

Filed January 25, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-1180 & 92-1219

TAYLOR INVESTMENT, LTD.,
COLLEEN DUFFY PRICE,
JAMES P. DUFFY,

Appellants in 92-1180

VGM CORPORATION,
GREGORY PATLAKH,

Appellants in 92-1219

v.

UPPER DARBY TOWNSHIP,
DONALD C. PHILLIPS, JAMES C. WARD,
RUDOLPH D'ALESIO, MARIO L. CIVERA,
NANCY WHITE

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action Nos. 91-01575 & 91-02910)

Argued September 18, 1992

Before: STAPLETON, SCIRICA and NYGAARD,
Circuit Judges

(Filed January 25, 1993)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

In this zoning dispute, plaintiffs Taylor Investment, Ltd., Colleen Duffy Price, and James P. Duffy appeal an order of the district court granting summary judgment

for defendants. The district court found plaintiffs' civil rights claims, 42 U.S.C. § 1983, were not ripe for judicial review. We agree that plaintiffs' claims are premature.

I.

Taylor Investment owns property in Upper Darby Township, Delaware County, Pennsylvania. Price and Duffy are limited partners of Taylor Investment. The individual defendants are a collection of Township officials: Donald Phillips is the Director of the Department of Licenses and Inspection and the zoning officer for the Township; James Ward was the Mayor of the Township;[1] Rudolph D'Alesio is the Vice President of the Township Council; Mario Civera is the State Representative for the 164th Legislative District and the Councilperson-at-large for the Township; and Nancy White is a member of Township Council. Plaintiffs allege that these individuals participated in the decision to revoke a use permit held by plaintiffs' tenant. Plaintiffs assert that the revocation of the permit violated the substantive and procedural due process and equal protection provisions of the Fourteenth Amendment.

A.

The property is located in a district zoned C-1, a classification for neighborhood-commercial establishments such as grocery and variety stores, barber and beauty shops, tailors and dressmakers, banks, and offices

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[1] Mayor Ward died after plaintiffs filed this action.

for attorneys, realtors, and health care professionals. Upper Darby Zoning Ordinance § 501. The purpose of the C-1 classification, by the terms of the Ordinance, "is to make provisions in appropriate locations for convenience type commercial and service uses primarily to meet the needs of individuals living in the immediate neighborhood." *Id.*

Before plaintiffs purchased the property, the previous owner used it as a health and fitness club, under a nonconforming use granted by the Township's zoning hearing board. That use fell within the C-2 zoning classification for general commercial districts. *See* Ordinance § 502. When the property was purchased, plaintiffs had the right, under the Ordinance, to operate an establishment as "a nonconforming use of the same or more restricted classification" as that granted to the previous owner. Ordinance § 1202(B). Plaintiffs sought a tenant who would use the property either in conformance with the C-1 neighborhood-commercial classification or as a continuation of the previous nonconforming use. Gregory Patlakh approached plaintiffs, seeking to rent the property and open a "physical fitness/sports center."

On July 26, 1990, Patlakh applied to the Township for a use permit. Under the Township's Ordinance, a use permit serves two primary functions. First, the use permit application allows the zoning officer to determine whether the intended use conforms to the allowed uses of the property under the zoning laws. Ordinance § 1601. Second, the use permit is a necessary predicate to any structural alteration of the property. *Id.* A use permit application must "contain all information necessary for

[a] Zoning Officer to ascertain whether the proposed . . . alteration, use, or change in use complies with the provisions" of the zoning laws. *Id.*

In his use permit application, Patlakh asked for permission to "operate a physical fitness/sports center with indoor golf, basketball, billiard and . . . snack bar." The Township's zoning officer, Donald Phillips, issued a use permit on August 1, 1990, describing the authorized use as a "physical fitness/sports center" Patlakh and plaintiffs thereafter signed a lease for the property. Patlakh then formed a corporation, VGM Corporation, and applied for a second use permit on September 4, 1990 – this time in VGM's name. In the application, Patlakh represented that his establishment would house "billards (25), indoor baseball[,] hockey, [and a] snack bar." Phillips issued a use permit to VGM on September 11, 1990, describing the authorized use as a "sport club" for "billiards; indoor baseball; hockey; [and] snack bar."

In preparation for the opening, Patlakh modified the property. The modifications required construction for which the Township issued a building permit. The Township's fire marshall and plumbing inspector inspected the property and voiced their approval of Patlakh's work. The Township's health inspector did not grant approval and required Patlakh to make additional structural modifications. Patlakh did not complete the work until after the use permit was revoked. The Health inspector never approved the work.

B.

Under Pennsylvania's Health and Safety code, every alteration of a building or structure must be inspected and approved before use or occupancy of the building. Pa. Stat. Ann. tit. 35, § 1229 (1977). Without such inspection and approval, no certificate of occupancy may issue. *Id.* These provisions of the Code are reflected in the Township's zoning ordinance. Under the Ordinance, a use permit holder must notify the zoning officer that all building work is complete, and the zoning officer must certify and approve the completion before the property can be occupied or used under the use permit. Ordinance § 1602. Patlakh did not notify Phillips that the work was complete, and Phillips never certified such completion. Under the terms of the Ordinance, Patlakh's and VGM's use permit was not "complete or permanently effective," *see id.*, without Phillips's approval of the structural-modification work.[2] In short, Patlakh could not lawfully operate his club at the time the use permit was revoked.

In January 1990, Patlakh advertised the opening of a "Billiard Sports Club" in newspapers and leaflets. The

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[2] The Ordinance provides, in part,

> [u]pon completion of the erection or alteration of any building or portion thereof authorized by any permit, and prior to occupancy or use, the holder of such permit shall notify the Zoning Officer of such completion. No permit shall be considered complete of permanently effective until the Zoning Officer has certified that the work has been inspected and approved as being in conformity with the provisions of the Ordinance and other applicable ordinances.

Ordinance, § 1602.

leaflets advertised "Delaware County's Largest Billiard Club," open twenty-four hours a day, seven days a week. The advertisements listed "25 Pool Tables" and "Pin Ball Machines" as the club's main attractions. In fact, Patlakh had twenty-five pool tables, one pinball machine, one video game, a compact-disc jukebox, and a foosball table on the property. Patlakh had no indoor baseball, hockey, golf, or basketball facilities.

On January 8, 1991, Patlakh opened his club before completing the structural modifications ordered by the Township's health inspector, before all of his equipment was in place, and without a fully effective use permit or a certificate of occupancy. Township police shut it down the same day. Zoning Officer Phillips thereafter revoked the use permit. In letters to Patlakh, VGM, and plaintiffs dated January 11, 1991, Phillips explained that he had revoked the permit "because these permit[] were issued erroneously based on false and misleading application [sic]."[3] The Ordinance requires that an applicant provide "*all* information necessary to the zoning officer to ascertain whether the proposed . . . use or change in use complied with the provisions of this Ordinance." Ordinance § 1601. If an applicant violates the Ordinance by supplying false or misleading information or by failing to secure inspection or approval of structural modifications,

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[3] Plaintiffs allege that Phillips did not revoke the permit. Rather, plaintiffs allege that the individual defendants decided to revoke the permit collectively and that Phillips merely issued the revocation letter. Regardless of Phillips' motivation for sending the revocation letter, the record clearly indicates that the use permit was officially revoked by the letter, which Zoning Officer Phillips sent to Patlakh, VGM, and plaintiffs.

the zoning officer is permitted to "take any enforcement action, whether by legal process or otherwise," to address the violation and "to prevent the occupancy of [the] building." Ordinance § 1603. It would appear, therefore, that Phillips had authority, under the Township's zoning ordinance, to revoke a use permit of an applicant who supplied false or misleading information in its application.

Plaintiffs did not reapply for a use permit, appeal the revocation to the Township Zoning Board, or seek a variance or special exception to the Township's zoning ordinances. Each of these options was available to plaintiffs under the Township's zoning ordinance and Pennsylvania's Municipal Planning Code. The zoning hearing board has exclusive jurisdiction to render a "final adjudication" regarding any decision of the zoning officer, such as revocation of a use permit. Pa. Stat. Ann. tit. 53, § 10909.1(a)(3)[4] The zoning hearing board also has exclusive jurisdiction to grant variances and special exceptions to the zoning ordinance. Ordinance § 1600; *see also* Pa. Stat. Ann. tit. 53, §§ 10910.2 & 10912.1. The zoning hearing board would have been required to hold a hearing on plaintiffs' appeal or request for a variance or special exception within sixty days of filing and to render a decision within forty-five days of the hearing. Pa. Stat.

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[4] § 10909.1(a) provides, in part, "[t]he zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in . . . [a]ppeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit. . . . " Pa. Stat. Ann. tit. 53, § 10909.1(a).

Ann. tit. 53, § 10908(1.2). Failure to take action on plaintiffs' request for relief would have resulted in deemed approval of the request. Pa. Stat. Ann. tit. 53, § 10908(9).

Instead of taking one of these actions, plaintiffs filed this civil rights action in the United States District Court for the Eastern District of Pennsylvania under 42 U.S.C. § 1983. Plaintiffs claimed that they were deprived of property without due process of law, that defendants's actions were arbitrary and capricious, and that defendants denied them equal protection of the law. Plaintiffs also filed a pendent state claim, alleging intentional interference of business relations with Patlakh and VGM.[5]

Several allegations, which we accept as true for the purposes of this appeal, are central to plaintiffs' claims. Plaintiffs assert that Phillips knew Patlakh intended to operate twenty-five pool tables at the property and believed that such use continued the nonconforming use of the previous occupant. Plaintiffs allege that community members exerted politically- and racially-motivated pressure on the defendants to block the opening of the sports club. Plaintiffs also allege that Township officials succumbed to this pressure, decided to revoke the permit, and forced Phillips to send the revocation letter.

Defendants moved for summary judgment. After discovery and a hearing, the district court granted the motion, holding that plaintiffs' claims were not ripe for judicial review.

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[5] Plaintiffs do not contest the district court's dismissal of their pendent claim.

II.

A.

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3). We have jurisdiction under 28 U.S.C. § 1291.

Our review of the district court's judgment on the basis of ripeness is plenary. *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 535 n.8 (3d Cir. 1989).

B.

We recognize "[t]here is some disagreement among courts and commentators as to whether the ripeness doctrine is grounded in the case or controversy requirement or is better characterized as a prudential limitation on federal jurisdiction." *Armstrong World Indus. v. Adams*, 961 F.2d 405, 411 n.12 (3d Cir. 1992).[6] Regardless, ripeness is "peculiarly a question of timing." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). "[I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in

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[6] We noted in *Armstrong* that even the Supreme Court has referred to ripeness as both a constitutional and prudential doctrine. 961 F.2d at 411 n.12 (citing *Thomas v. Union Carbide Agric. Prods Co.*, 473 U.S. 568, 579-82 (constitutional doctrine); *Buckley v. Valeo*, 424 U.S. 1, 117-18 (per curiam) (prudential doctrine)). We concluded that even if "the ripeness doctrine has a prudential component, it seems clear that it is at least partially grounded in the case or controversy requirement" of Article III. *Id.; see generally* Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 3532.1 (1984).

abstract disagreements." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967).

Because ripeness affects justiciability, we believe that unripe claims should ordinarily be disposed of on a motion to dismiss, not summary judgment.[7] Some courts of appeals – confronted with premature claims on review of a grant of summary judgment – have vacated the district court's judgment and remanded with instructions to dismiss. *See Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 508 (9th Cir. 1990). We adopt that view.

III.

Plaintiffs challenge the revocation of Patlakh's use permit under the Fourteenth Amendment, alleging violations of substantive due process, procedural due process, and equal protection.[8] To prevail on substantive and procedural due process claims,[9] plaintiffs must have been

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[7] We note, however, that the district court is not limited to the fact of the pleadings in deciding such a motion. As long as the parties are given an adequate opportunity to address the justiciability of the claim, the district court " 'may inquire, by affidavits or otherwise, into facts as they exist.' " *Armstrong*, 961 F.2d at 410 n.10 (quoting *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947)).

[8] The Fourteenth Amendment to the Constitution provides, in pertinent part, that "[n]o state . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. Const., amend. XIV, § 1.

[9] Plaintiffs also challenge the Township's action under the Fourteenth Amendment's Equal Protection Clause. We consider this challenge in part IV, *infra*.

deprived of a property interest because of either arbitrary and capricious government action or a denial of fair legal process. *See generally Reich v. Beharry*, 883 F.2d 239, 242-43 (3d Cir. 1989). Plaintiffs claim they have a protected property interest in the use permit sufficient to implicate due process. We assume, without deciding, that this is the case.

IV.

Plaintiffs brought constitutional challenges to a land-use decision under 42 U.S.C. § 1983. The Supreme Court has held that such challenges are not ripe unless plaintiff has given local land-planning authorities the opportunity to render a final decision on the nature and extent of the impact of the zoning ordinances on plaintiff's property. *See Williamson Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985);[10] *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986).

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[10] Relying on *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), plaintiffs contend that they should not be required to exhaust state administrative remedies before bringing claims under § 1983. We agree that exhaustion of remedies in not a prerequisite to claims under § 1983; however – as the Supreme Court held in *Williamson* – "[t]he question whether administrative remedies must be exhausted is conceptually distinct . . . form the question whether an administrative action must be final before it is judicially reviewable." 473 U.S. at 192. The *Williamson* Court explained

> While the policies underlying the two concepts overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts actual, concrete injury; the exhaustion requirement generally

In *Williamson*, a local planning commission rejected plaintiff's development plat by applying new regulations retroactively after having twice approved the plat under prior regulations. 473 U.S. at 177-82. Plaintiff brought suit, alleging an unconstitutional taking under the Fifth Amendment because the commission had denied all economically viable uses of the property. *Id.* at 185. In the alternative, plaintiff claimed a due process violation because the commission effectively sought to deprive plaintiff of its property without instituting eminent domain proceedings under state law. *Id.* The Supreme Court held that, under either theory, plaintiff's claim was premature because it had neither sought a variance from the new regulations nor pursued compensation through appropriate state procedures. *Id.* at 193-94.

In *MacDonald*, the Court again addressed ripeness of constitutional claims arising from local zoning disputes. There, plaintiff's subdivision plan was rejected by a local planning commission and, on appeal, by the county board of supervisors, 477 U.S. at 342. Plaintiff thereafter sued in federal court, claiming that the commission had taken its property without just compensation. The *MacDonald* Court found plaintiff's claim premature because, even though it had appealed the rejection of the plan, plaintiff had not submitted less intensive development

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> refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Id. at 193.

plans with the planning commission. *Id.* at 351-52. Plaintiff's failure to submit such plans "le[ft] open the possibility that some development will be permitted. . . . " *Id.* at 352. Without a final adjudication of the uses to which plaintiff could put its property, the Court refused to hear plaintiff's constitutional challenge.

In the context of land-use decisions, *Williamson* and *MacDonald* require state zoning authorities be given an opportunity to "arrive[] at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question" before its owner has a ripe constitutional challenge based on the disputed decision. *Williamson*, 473 U.S. at 191. This finality rule recognizes that, with respect to zoning disputes, a property owner suffers no mature constitutional injury until the zoning authority defines the application of the zoning ordinance and defines the harm to the owner. The finality rule also prevents the premature adjudication of zoning disputes. As the Court of Appeals for the Eleventh Circuit explained, "zoning is a delicate area where a county's power should not be usurped without giving the county an opportunity to consider concrete facts on the merits prior to a court suit." *Eide v. Sarasota County*, 908 F.2d 716, 726 n.17 (11th Cir. 1990), *cert denied*, 111 S. Ct. 1073 (1991); *see also Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (with *Williamson* and *MacDonald*, the Supreme Court "erected imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning boards"). This court itself has observed that "land-use regulation generally affects a broad spectrum of persons and social interests, and . . . local political bodies are better able than federal courts to assess the

benefits and burdens of such legislation." *Rogin v. Bensalem Tp.*, 616 F.2d 680, 698 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981).

Although strong policy considerations favor local resolution of land-use disputes, neither *Williamson* nor *MacDonald* explained whether the finality rule applies to challenges to land-use decisions under any constitutional theory or only takings-type claims. The parties have asked us to determine the scope of the finality rule. Plaintiffs contend it applies only to "takings" claims and ask us to overturn *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), *cert denied*, 112 S. Ct. 1668 (1992) – a step we are clearly unable to take. *See Landano v. United States Dep't of Justice*, 956 F.2d 422, 434 (3d Cir.), *cert. denied*, 1992 WL 179166 (1992). Defendants contend the finality rule applies regardless of the theory on which plaintiffs attack a land-use decision – even where the attack is premised on substantive due process, procedural due process, and equal protection. We believe the finality rule applies to each of plaintiffs' claims.

A.

To prevail on a substantive due process claim, a plaintiff must demonstrate that an arbitrary and capricious act deprived them of a protected property interest. *See Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989); *Moore v. Warwick Pub. Sch. Dist.*, 794 F.2d 322, 329 (8th Cir. 1986). Plaintiffs claim Phillips's actions were arbitrary and capricious and deprived them of a property interest in the use permit. Before we can determine whether the Zoning Officer's

application of the ordinance is arbitrary and capricious, the Township must be given an opportunity to finally determine how it will interpret and apply those laws. *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 686 (3d Cir. 1991).

In *Midnight Sessions*, the owners of an all-night club ("Down South") filed suit under 42 U.S.C. § 1983 claiming, inter alia, the City of Philadelphia violated their rights to substantive due process of law, 945 F.2d at 670. As the basis for their claim, the owners alleged the City had enforced building and fire regulations in an arbitrary and irrational way. The City had cited Down South for failing to post conspicuously a sign indicating maximum occupancy and to recharge fire extinguishers. *Id.* at 672. Because of these citations, the City denied Down South's request for a certificate of occupancy. *Id.* at 673.

Relying on *Williamson*, we dismissed the owners' substantive due process claim on ripeness grounds. *Id.* at 686. We explained that:

> Down South did not appeal to the Review Board the citations for violations it received from [the City's Department of Licenses and Inspection] nor the denial of its certificate of occupancy. This failure to appeal *precludes "final administrative action" by the City* and, therefore, these claims were premature and should have been dismissed on summary judgment.

Id. (emphasis added).

Applying the finality rule, we find plaintiffs' substantive due process claim is not yet ripe for adjudication.

Although plaintiffs allege Phillips's actions were arbitrary and capricious and deprived them of a property interest in the use permit, the Township has rendered no final decision regarding the revocation of the permit.

Plaintiffs claim Phillips revoked Patlakh's use permit under the pretext that Patlakh had included false and misleading information on his use-permit application. Plaintiffs contend Phillips knew of the intended use of the property, believed the use was consistent with the nonconforming-use of the prior tenant, but revoked the permit on orders from other Township officials. Even assuming these allegations are true, Phillips's revocation was not a final revocation of the permit.

Under Pennsylvania's Municipal Planning Code, Phillips musty administer the Township's zoning ordinance in the first instance. *See* Pa. Stat. Ann. tit. 53, § 10614; *see also Rogin v. Bensalem Tp.*, 616 F.2d at 694 (zoning officer has "inflexible ministerial" duty to apply zoning regulations as he or she understands them). Any action by Phillips, however, did not represent the Township's final interpretation or application of the zoning ordinance. *See Rogin*, 616 F.2d at 694-95. Only the zoning hearing board's determination is a "final adjudication" under the terms of the Code. Pa. Stat. Ann. tit. 53, § 10909.1(a).[11] The zoning hearing board has exclusive authority to determine whether Phillips failed to follow

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[11] As we have set forth, § 10909.1(a) provides "[t]he zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in . . . [a]ppeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit. . . . " Pa. Stat. Ann. tit. 53 § 10909.1(a).

prescribed procedures or misinterpreted or misapplied any provision of the Township's ordinance.[12] *See* Pa. Stat. Ann. tit. 53, § 10909.1. The Ordinance requires no deference by the zoning hearing board to Phillips's decision, and the zoning hearing board would have been free to consider the facts and circumstances of Patlakh's application anew. *See id.*

Only the zoning hearing board could definitively and finally revoke use permits under the Township's ordinance. If plaintiffs had filed for relief with the zoning hearing board, the board could have determined that Patlakh's application was not false or misleading and that his use of the property as a pool hall constituted a continuation of the previous nonconforming use.[13] Under *Williamson* and *MacDonald*, the zoning hearing board must make that determination before plaintiffs' substantive due process claim is ripe. Only then will it be clear whether the Township has acted in an arbitrary and capricious manner. *See Eide v. Sarasota County*, 908 F.2d

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[12] Of course, an aggrieved party may appeal for judicial review. 53 Pa. Stat. Ann. §§ 1101-A *et seq.* A claim is "final," however, after the zoning hearing board has rendered a decision. Finality does not require state court review of the board's decision.

[13] As we stated earlier, the zoning hearing board would have been required to hold a hearing on any request for relief within sixty days of the request and to issue a decision within forty-five days of the hearing. *See* Pa. Stat. Ann. tit. 53, § 10908(1.2). We believe this time period is not unduly burdensome. This is especially true where, as here, plaintiff had no occupancy permit and could not have legally opened for business at the time the Township revoked the use permit.

716, 725 n.16 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1073 (1991).

B.

Plaintiffs also characterized the revocation of their use permit as "a deprivation of [a] property interest without due process of law in violation of the Fourteenth Amendment to the Constitution." To prevail on a procedural due process claim, plaintiffs must demonstrate the Township deprived them of a protected property interest and state procedures for challenging that deprivation do not comport with due process of law. *See, e.g., Layton v. Beyer*, 953 F.2d 839 (3d Cir. 1992). Central to the Supreme Court's reasoning in *Williamson* is the notion that local zoning authorities must fully and finally determine whether, and to what extent, a deprivation has occurred before a federal claim is mature. 473 U.S. at 200.

In *Williamson*, the Court held the plaintiff's claim was premature "whether it is analyzed as a deprivation of property without due process of law under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." *Id.* The Court specifically considered the argument that, in rejecting plaintiff's development plat, the planning commission violated plaintiff's due process rights by failing to proceed under the state's eminent domain procedures. *Id.* at 197-99. In other words, the *Williamson* plaintiff stated a procedural due process claim.[14] The *Williamson* Court

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[14] We note that, although this claim has often been deemed a regulatory takings claim under the Fourteenth Amendment, it

refused to consider the merits of this claim because plaintiff failed to apply for a variance before initiating its federal lawsuit. *Id.* at 199-200.

Other federal courts of appeals have regularly applied *Williamson*'s finality rule to procedural due process claims. In *Bigelow v. Michigan Department of Natural Resources*, the court held that a procedural due process claim, based on an allegation of no hearing before a deprivation of a property interest, is subject to the finality rule. 970 F.2d 154, 159-60 (6th Cir. 1992).[15] Similarly, in *Herrington v. Sonoma County*, the court held that *Williamson* applied to all procedural due process claims that challenge "the process by which officials reach land-use decisions." 857 F.2d 567, 569 n.1 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).

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is not a takings claim "in the literal Fifth Amendment sense, but is a metaphor for actions having the same effect as a taking by eminent domain." 473 U.S. at 198. Therefore, the claim in *Williamson*, like plaintiffs' claim here, was a procedural due process claim.

[15] Plaintiffs' reliance on *Nasierowski Bros. Inv. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), is misplaced. In *Nasierowski*, the Court of Appeals for the Sixth Circuit held the finality rule does not apply to facial challenge to a zoning ordinance. 949 F.2d at 894-95. Plaintiffs in this case have not made a facial challenge to Upper Darby's zoning ordinance. Rather, plaintiffs contend that Phillips engaged in improper conduct in exercising his authority under those ordinances. As demonstrated by *Bigelow*, plaintiffs' "as applied" challenge is subject to the finality rule even under the Sixth Circuit authority. *See* 970 F.2d at 159-60 (*Williamson* governed "as applied" challenge under due process clause).

Plaintiffs contend the finality rule does not apply to a due process deprivation that, in itself, causes injury and that, because Phillips strayed from established procedure in revoking their permit, they have suffered a mature constitutional injury. In *Williamson* and *MacDonald*, however, the Supreme Court did not ignore the fact that certain land-use decisions may cause injury. Rather, in the face of potential constitutional injuries, the Court held the local authorities should be given the opportunity to fully and finally determine the scope of the injury before federal claims ripen. Local zoning authorities are flexible institutions, according to the Court, that may "give back with one hand what they have taken with the other."[16] *MacDonald*, 477 U.S. at 350. Any deprivation suffered by plaintiff's tenant as a result of the revocation of the use permit could have been quickly remedied by the zoning hearing board under the applicable legislative scheme, a scheme we have held to be consistent with due process.[17]

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[16] We agree with the Court of Appeals for the Ninth Circuit that the flexibility inherent in local zoning systems "is obviously useless if the property owners abandon their applications after rejection by civil servants with narrow authority and before seeing relief from a body with broader powers." *Southern Pacific v. City of Los Angeles*, 922 F.2d 498, 503 n.5 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 382 (1991).

[17] Under that scheme, the zoning officer determines whether the use proposed by the property owner is in conformity with the zoning and other applicable ordinances and, in effect, makes a recommended finding. That recommended finding then provides the basis for a *de novo* hearing before the zoning hearing board at which the owner has a chance to be heard and present evidence. Only thereafter is a final decision made as to whether the proposed use complies with the applicable criteria.

See Rogin v. Bensalem Tp., 616 F.2d at 695. Although plaintiffs may, at some point, have a mature and colorable claim because of the Township's actions[18] – assuming they had a property interest in the permit at all – *Williamson* and *MacDonald* require that plaintiffs allow local authorities to act with finality under the zoning ordinance before pursuing a due process claim.

C.

Plaintiffs alleged defendants revoked Patlakh's permit based on improper racial and political motivations in violation of the equal protection clause of the Fourteenth Amendment. Plaintiffs are not members of a suspect or quasi-suspect class nor do they claim that the Township's action has burdened a fundamental right. In the absence of a suspect class or fundamental right, plaintiffs' equal protection claim merits no heightened scrutiny. *See Lyng v. Castillo*, 477 U.S. 636, 638-39 (1986). Therefore, like their substantive due process claim, plaintiffs can prevail on equal protection claim only if the Township's actions were not rationally related to a legitimate purpose. *See Rogin v. Bensalem Tp.*, 616 F.2d 680, 687 (3d Cir. 1980), *cert. denied*, 450 U.S. 1092 (1981). In these circumstances, where no suspect classification is alleged and no fundamental

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[18] We note the revocation of the use permit had no immediate impact on Patlakh's business operations. Patlakh could not have legally operated is business even if the use permit had not been revoked because he had secured no final approval of the structural modifications to the property and had no certificate of occupancy. By the terms of the Ordinance, plaintiffs' permit was neither complete nor permanently effective without such approval. Ordinance § 1602.

right infringed, we believe that a plaintiff's equal protection claim is not ripe under *Williamson* until the zoning authority has taken final action. *See Unity Ventures v. Lake County*, 841 F.2d 770, 775 n.2 (7th Cir.), *cert. denied*, 488 U.S. 891 (1988); *see also Pennel v. City of San Jose*, 485 U.S. 1, 11 n.5 (1988) (equal protection claim based on rent control ordinance premature because regulatory authority rendered no decision regarding application of ordinance to plaintiff's property).

Until the Township has fully and finally considered how a specific landowner is treated under the zoning scheme, a federal court cannot determine whether the landowner has been dissimilarly treated nor whether such treatment is rationally related to a legitimate government purpose. *Accord Bigelow*, 970 F.2d at 158; *Landmark Land Co. of Oklahoma v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989); *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989). Like a takings claim, the injury – dissimilar and irrational treatment – ripens only after the zoning hearing board takes final and definitive action through its variance or review procedures. Because plaintiffs resorted to neither, their equal protection claim is not ripe for judicial review.

V.

For these reasons, we will vacate the judgment of the district court and remand with instructions to dismiss.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1180

TAYLOR INVESTMENT, LTD.,
COLLEEN DUFFY PRICE,
JAMES P. DUFFY,

Appellants

v.

UPPER DARBY TOWNSHIP,
DONALD C. PHILLIPS, JAMES C. WARD,
RUDOLPH D'ALESIO, MARIO L. CIVERA,
NANCY WHITE

(D.C. Civ. No. 91-01575)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, *Circuit Judges*.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having

voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Illegible
Circuit Judge

Dated: MAR 16 1993

No. 93-217

Supreme Court, U.S.
FILED
SEP 9 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

TAYLOR INVESTMENT, LTD., COLLEEN DUFFY PRICE and JAMES P. DUFFY,

Petitioners,

vs.

UPPER DARBY TOWNSHIP, DONALD C. PHILLIPS, JAMES C. WARD, RUDOLPH D'ALESIO, MARIO L. CIVERA and NANCY WHITE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the courts below depart from established precedent when they determined that the petitioners' claims of constitutional rights violations, whether premised on substantive due process, procedural due process, or equal protection violations, were not ripe for judicial review because the petitioners had not sought, nor given the local land planning authority the opportunity to render, a final decision on the nature and extent of the impact of the zoning ordinances on the petitioner's property.

A. The decisions of the courts below did not depart from the precedent established by this Honorable Court in *Williamson*. This Honorable Court's decision in *Patsy v. Florida Board of Regents*, as explained by the Court in *Williamson* is simply distinguishable and thus inapplicable to this case.

B. The lower courts did not depart from established precedent in holding that the petitioners' equal protection claims (racial animus) were not ripe for judicial review.

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A. The Decisions of Courts Below Did Not Depart From the Precedent Established By This Honorable Court in *Williamson*. This Honorable Court's Decision in *Patsy Florida Board of Regents*, as Explained By the Court in *Williamson* is Simply Distinguishable and Inapplicable to This Case. 13

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COUNTERSTATEMENT OF THE CASE

At the outset it is important to note that, ripeness is a jurisdictional question which must be decided before reaching the merits of a case. Accordingly, a fairly brief recitation of the facts is all that is needed.[1]

The instant case arises out of the petitioners' attempt to develop a third parcel of real estate in Upper Darby Township. At all times relevant to this instant case the Taylor Investment petitioners were very experienced in real estate investment and development. (App. at 47-48, 53-54 and 134-35). Petitioner Price is an experienced real estate attorney (App. at 47-48 and 53), and all petitioners are partners in several real estate partnerships which hold title to approximately twenty properties in the greater Philadelphia area. (App. at 53-54 and 134 -35).

Prior to the time of the allegations of the petitioners' Complaint in the instant case, the petitioners, through the aforesaid partnerships, owned and/or leased two properties within Upper Darby Township, located at 67 Long Lane (the "Long Lane" property) and at 7042 through 7062 Terminal Square (the "Terminal Square" property). (App. at 148-49). During the course of the petitioners' acquisition and development of the Long Lane and Terminal Square properties and while contemplating the acquisition and construction of the property which is the subject of

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1. The petitioners have presented a relatively lengthy rendition of the "merits" of their claim in the Statement of the Case section of their Petition. In this regard, the petitioners' Statement of the Case is impermissively argumentative and is sprinkled with legal conclusions. A fuller recitation of respondents' version of the facts may be found in respondents' Motion for Summary Judgment and subsequent Reply Brief filed below. (*See* Docket Nos. 30-31, 37) The inclusion of facts in respondents' Counterstatement of the Case herein should not raise the inference that all of these facts are "material" for the purposes of this Honorable Court's review.

this lawsuit, the petitioners initiated contact with Upper Darby Township political leaders in attempts to solicit these officials' favor and political influence to obtain approval for the projects or uses they wished for these properties. (App. at 67, 146-47 and 150-61).

In January of 1990, the petitioners entered into an agreement to purchase the property at 3 South State Road in Upper Darby Township ("the premises") from the mortgage holder in foreclosure. (App. at 143). The premises were located in a district zoned C-1 under the Upper Darby Township zoning ordinance.[2] Prior to the petitioners' purchase of the premises, this property had last been used as a health and fitness club. (App. at 140-41). The health club had a swimming pool and sauna and was used for physical fitness. (App. at 290). The health club use was authorized by special exception granted by the Zoning Hearing Board of Upper Darby Township on September 30, 1982. The health club then became a non-conforming use when the zoning ordinance was amended in 1986. (App. at 60). The petitioners admit that they obtained and reviewed a copy of the Upper Darby Township Zoning Ordinance of 1986 and were aware of the applicable zoning classifications and permitted uses. (App. at 61-62).

In February of 1990, the petitioners solicited the assistance of respondent, Upper Darby Township Councilman Civera to help expedite the process of obtaining a necessary demolition permit for the premises. (App. at 162). Thereafter, on or about July 18, 1990, the petitioners were introduced to co-petitioner Gregory Patlakh. Mr. Patlakh was interested in opening a pool hall and came to the

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2. C-1 is labeled a neighborhood commercial district defined as providing "appropriate locations for convenience type commercial and service uses primarily to meet the needs of individuals living in the immediate neighborhood." Article 5, Section 501 of the Upper Darby Zoning Ordinance of 1986 further outlines the permitted uses in this zone. (App. at 23-25).

petitioners in search of a suitable location with approximately 5,000 square feet of floor space. (App. at 91, 271-72 and 276). Despite knowing of Patlakh's desire to establish merely a pool hall, in the applications for Certificates of Use[3] that the petitioners submitted to Upper Darby Township, and in their discussion with Zoning Officer Phillips, the petitioners referred to the proposed use as a "physical fitness/sports center" with indoor golf, basketball, billiards, baseball and hockey. (App. at 182-83, 417 and 421). The petitioners further represented that "applicants use is consistent with the previous non-conforming use and classification." (App. at 417). The petitioners also represented to Zoning Officer Phillips that the proposed "sports" uses were not to be small coin operated type arcade games, but rather were to be full scale sport venues including one-on-one basketball courts, baseball batting cages, and a golf driving or putting facility. (App. at 84-85 and 277-80).

The Upper Darby Township Zoning Ordinance requires that applications for Certificates of Use "shall contain all information necessary for Zoning Officer to ascertain whether the proposed . . . use or change in use complies with the provisions of this Ordinance." (App. at 44 [Section 1601]) . The zoning ordinance also provides that "no permit shall be considered complete or permanently effective until the zoning officer certifies that the use is in conformity with the provisions of the Upper Darby Township Ordinances." (App. at 44 [Section 1602]).

Prior to granting petitioners use permits, Zoning Officer

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3. "Under the Township's Ordinance, a use permit serves two primary functions. First, the use permit application allows the zoning officer to determine whether the intended use conforms to the allowed uses of the property under the zoning laws. Ordinance § 1601. Second, the use permit is a necessary predicate to any structural alteration of the property." (Opinion of the Lower Court, Petitioners' Petition at 15a.)

Phillips asked the petitioners to provide him with evidence that there had not been an improper lapse in the prior conforming health club use (App. at 87) pursuant to the Upper Darby Township Zoning Ordinance which provides that "should a non-conforming use cease operation for a period of twelve (12) consecutive months, said use shall be considered abandoned and all rights arising from the nonconforming status shall be considered voided." (App. at 42 [Section 1202(c)]). In response to Phillips' request, the petitioners submitted to him letters from two real estate brokers purporting to establish no lapse of use. (App. at 87). However, the petitioners failed to supply Phillips with a third letter in their possession at that time. That letter was from the Philadelphia Electric Company and indicated that electrical service for the prior health club use was terminated more than twelve months prior to the petitioners' use application. (App. at 250). This letter would have called into question whether the prior non-conforming use had lapsed, precluding the use of the premises as a health club or any other non C-1 use.

Based upon the documents submitted by the petitioners and the petitioners' oral representations, Zoning Officer Phillips, then believing the petitioner's proposed use to be in compliance with Township Ordinances, issued Certificates of Use to the petitioners. Thereafter, the petitioners entered into a lease with Patlakh on or about August 10, 1990. This lease recited the following:

> By zoning permit dated August 1, 1990, the Upper Darby Township Building Inspector granted a permit to allow the operation of the *sports center and snack bar* as described in the attached application for a Certificate of Use. *It is understood and agreed that Landlord does not warrant that Tenant's proposed use of the property is in accordance with any applicable zoning ordinance* and is not responsible for any

> actual or consequential damages should this use be determined to violate zoning. However, *if during the term of this lease, Upper Darby Township determines that Tenant's operation of thirty billiard tables along with the uses described above is determined not permitted under the applicable zoning, Tenant shall have the option to terminate this Lease,* upon 30 days written notice to Landlord: provided, however, Tenant shall remain liable for all rent due hereunder if tenant is permitted to operate its business while Landlord pursues whatever action it deems necessary to pursue a zoning challenge, at Landlord's expense, including the commencement of a suit in a court of law and any appeals related thereto.

(App. at 349) (emphasis added).

The true intended use of these premises did not become apparent to Township officials or Zoning Officer Phillips until January of 1991 when flyers were circulated throughout the community and advertisements appeared in local newspapers advising that a twenty-four hour billiard hall was being opened at the premises. (App. at 464). The advertisement for the opening of the petitioners' premises stated, *inter alia,* "Grand Opening Billiard Sports Club Delaware County's Largest Billiard Club Twenty-Five Pool Tables, Pinball Machines . . . Open Twenty-Four Hours, Seven Days A Week." (App. at 464).

Thereafter, individuals who lived in the residential neighborhood adjacent to the premises notified respondent, Councilperson White of the advertisement. (App. at 327-39). Councilperson White thereafter called Phillips who advised White that he would send out an inspector to observe the premises. (App.

at 226-27). An inspection of the premises was thereafter performed by Code Inspection Officer, Robert Welsman. (App. at 226-27 and 342). On or about January 7, 1991, based upon Mr. Welsman's inspection of the second floor of the premises it was determined that Patlakh was attempting to open for business with twenty-five pool tables, a coin operated video game and a juke box, and that no other "sports" equipment was present at the second floor of the premises. (App. at 282-83 and 342-43).

On or about January 8, 1990, in defiance of Upper Darby Township Code Enforcement Officer Welsman's instructions not to open until all permits were approved, and lacking any legal authority, Certificate Occupancy or other authorization, Patlakh opened for business.

Patlakh was subsequently ordered by police to shut down his operation. At no time was a Certificate of Occupancy issued by Upper Darby Township. Nor did petitioners obtain the requisite prior approvals.[4]

In response to a call by petitioner Price, a meeting was scheduled between Price and Upper Darby Township officials on January 8, 1991. (App. at 107). At that meeting the matter was reviewed and discussed and Price was told that the Use Certificates would be rescinded and that she should go to the Zoning Hearing Board. (App. at 113 and 128). However, petitioners did not seek

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4. Plaintiffs claim in their brief that they had been told by the fire marshall and plumbing inspector that the premises had passed inspection; however, no such official approval had been given nor had the plaintiffs obtain the requisite certification from the Commonwealth of Pennsylvania pursuant to the Pennsylvania Fire and Panic Act. All of said certifications would have been necessary to receive a final Certificate of Occupancy. The Township health inspector did not grant approval and required Patlakh to make additional structural modifications which he did not complete until after the use permit was revoked — the work was never approved and no certification was given.

relief from the Zoning Hearing Board. Rather than seeking a review by the Zoning Hearing Board, and before even receiving formal written notice that the certificates were rescinded, petitioner Price told the respondents during the January 8, 1991 meeting that she was going to sue them. (App. at 119-20). Zoning Officer Phillips thereafter, by letter dated January 11, 1991, advised the petitioners that their use permits were revoked "because these permit[s] were issued erroneously based on false and misleading application [sic]. (Lower Court Opinion, Petitioners' Petition at 18a).[5] Thereafter petitioners filed the instant suit.[6] Following respondents' Motion for Summary Judgment the lower court entered judgment in favor of respondents holding that the petitioners' claims were not ripe for judicial review because of their failure to seek a final decision regarding their proposed use of their property from the appropriate Upper Darby Township administrative body. On appeal to the Court of Appeals for the Third Circuit, the petitioners conceded that they "do not challenge the constitutionality of any zoning or permit regulations of Upper Darby Township . . ." (Reply Brief of Appellants at p. 18 lines 4-6; *see also*: Petitioners' Petition for Writ (Reasons for Granting Writ) at p.13). The Third Circuit Court of Appeals, per Judge Scirica, vacated the District Court's judgment and remanded with instructions to dismiss the petitioner's Complaint as not being ripe. This Petition for Writ of Certiorari follows.

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5. "The extent of Phillip's action amounted to a decision of a zoning officer denying a permit (albeit the denial came as a revocation of an issued, though not enforceable, permit). (Lower Court Opinion, Petitioners' Petition at 8a).

6. Plaintiffs never sought a review of Phillip's decision from the Zoning Hearing Board which by statute is the only local Township body given authority to render "final adjudications". 53 P.S. § 10909.1 (App. at 477).

SUMMARY OF ARGUMENT

The courts below did not depart from established precedent when they determined that the petitioners' claims under Section 1983 were not ripe for adjudication based upon this Honorable Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). The courts below correctly decided that whether premised on substantive due process, procedural due process or equal protection violations, the petitioners' claims were not ripe for judicial review because they had not sought reconsideration or a variance for special exception to the zoning officer's revocation of their use permits from the local zoning hearing board, given exclusive jurisdiction to render a final decision on the application of zoning ordinances to the petitioners' property.

The petitioners' claim that the zoning officer was motivated by racial animus or other improper motive does not except the petitioners from complying with the *Williamson* ripeness requirement. The petitioners admit that they do not challenge the constitutionality of any zoning or permit regulation of Upper Darby Township and thus must seek a final decision from the proper zoning board before bringing suit in federal count under Section 1983.

This Honorable Court's decision in *Williamson* and its progeny are fully consistent with the lower courts' decisions below and for this reason this Honorable Court should deny the petitioners' Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURTS BELOW DID NOT DEPART FROM ESTABLISHED PRECEDENT WHEN THEY DETERMINED THAT THE PETITIONERS' CLAIMS OF CONSTITUTIONAL RIGHTS VIOLATIONS, WHETHER PREMISED ON SUBSTANTIVE DUE PROCESS, PROCEDURAL DUE PROCESS, OR EQUAL PROTECTION VIOLATIONS, WERE NOT RIPE FOR JUDICIAL REVIEW BECAUSE THE PETITIONERS HAD NOT SOUGHT, NOR GIVEN THE LOCAL LAND PLANNING AUTHORITY THE OPPORTUNITY TO RENDER, A FINAL DECISION ON THE NATURE AND EXTENT OF THE IMPACT OF THE ZONING ORDINANCES ON THE PETITIONERS' PROPERTY.

The courts below properly determined that the petitioners' claims were not ripe for judicial review because the decision that petitioners' claim gives rise to their cause of action was not a final decision. The ripeness doctrine is based upon the "case or controversy" requirement of Article III of the federal Constitution, as well as upon prudential policy reasons. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 579-82 (1985) (Constitutional Doctrine); *Buckley v. Valeo*, 424 U.S. 1, 117-18 (1976) (per curiam) (prudential doctrine); 13A Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 3532.1, at 115 (1984). The need to consider prudential limitations in addition to those framed in the Constitution was articulated by Justice Frankfurter as follows:

> The restriction of our jurisdiction to cases and controversies within the meaning of Article III . . . is not the sole limitation on the exercise of

> our appellate powers, especially in cases raising constitutional questions.

Id. at 117-18 (*citing Poe v. Ullman*, 367 U.S. 497, 502-03, 81 S. Ct. 1752, 1755, 6 L. Ed. 2d 989 (1961)).

Thus, the decision not to exercise judicial review based upon the lack of ripeness can be predicated upon either constitutional or prudential policy reasons.

Id. at 118.

> Ripeness doctrine is drawn both from Article III limitations on judicial power and discretionary reasons of policy for refusing to exercise existing power. The central concern of both power and discretion is that the tendered case involves uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all.

Id. n. 9 (*quoting Metzenbaum v. FERC, C.A.*, 675 F.2d 1282, 1289-90 (D.C. Cir. 1982)).

Beyond the general concerns of contingency and uncertainty, discretionary policy reasons for invoking the ripeness doctrine include considerations of deference and comity to state institutions; avoidance of unnecessary constitutional decisions; and the existence of opportunities to secure relief from an executive or administrative entity. *Id.* at 115 and 120-21. The opportunity to secure relief from a state agency is distinguishable from the requirement to exhaust administrative remedies. *See* 13A Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3532.6 (1984). The prudential considerations weighing against finding that a claim is ripe are more pronounced

where a federal court is asked to interfere with a state agency as opposed to a federal agency. *Id.* at 203.

In weighing the various discretionary policy reasons for refusing to exercise existing power, this Honorable Court should consider the effect that a finding for the petitioners herein would have on the ability of any disappointed real estate developer to enter federal court at any point in the development process and wield the substantial power of 42 U.S.C. §§ 1983 and 1988. Providing easy access to the federal courts for every disappointed developer who chooses not to utilize even the most expeditious available state procedures would result in an unnecessary flood of § 1983 litigation. This Honorable Court and the Circuit Courts have uniformly recognized these prudential limitations which strongly caution against extending 1983 jurisdiction to any land use dispute and the need for constitutional line drawing in this area.

The First Circuit has stated the following concerning the dangers of elevating local land use disputes to the level of federal constitutional violations:

> [w]here ... the state offers a panoply of administrative and judicial remedies, litigants may not ordinarily obtain federal court review of local zoning and planning disputes by means of § 1983.

Raskiewcz v. Town of New Boston, 754 F.2d 38, 44 (lst Cir. 1985), *cert. denied*, 474 U.S. 845 (1985).

Similarly, the First Circuit has also declared that:

> *Every* appeal by a disappointed developer from an adverse ruling by a local planning board necessarily involves some claim that the board

> exceeded, abused, or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developers point of view) reason. It is not enough simply to give the state law claims constitutional label such as "due process" or "equal protection" in order to raise a substantial federal question under Section 1983.

Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (lst Cir. 1982) (emphasis in original).

The Seventh and Ninth Circuits have stated:

> In land use challenges, the doctrine of ripeness is intended to avoid premature adjudication or review of administrative action. It rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable.

Unity Ventures v. County of Lake, 841 F.2d 770, 774 (1980); *quoting: Herrington v. County of Sonoma*, 834 F.2d 1488, 1494 (9th Cir. 1987)

The Third, Ninth and Eleventh Circuits have stated:

> Zoning is a delicate area where a county's power should not be usurped without giving the county an opportunity to consider concrete facts on the merits prior to a court suit . . . [*Williamson* and *McDonald*] erected imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning

> boards . . . land use regulati[illegible]nerally affects a broad spectrum of persons and societal interests, and . . . local political bodies are better able than federal courts to assess the benefits and burdens of such legislation.

(Lower Court Opinion, Petitioners' Petition at 25a-26a, *citing*: *Eide v. Sarasota County,* 908 F.2d 716, 726 n.17 (11th Cir. 1990), *cert. denied,* 111 S. Ct. 1073 (1991); *Hoehne v. County of San Benito,* 870 F.2d 529, 532 (9th Cir. 1989); *Rogin v. Bensalem Tp.,* 616 F.2d 680, 698 (3rd Cir. 1980), *cert. denied,* 450 U.S. 1029 (1981).

A.

THE DECISIONS OF COURTS BELOW DID NOT DEPART FROM THE PRECEDENT ESTABLISHED BY THIS HONORABLE COURT IN *WILLIAMSON.* THIS HONORABLE COURT'S DECISION IN *PATSY FLORIDA BOARD OF REGENTS,* AS EXPLAINED BY THE COURT IN *WILLIAMSON* IS SIMPLY DISTINGUISHABLE AND INAPPLICABLE TO THIS CASE.

Petitioners' claims are not ripe for judicial review because of the petitioners' failure to seek a final decision regarding the rescission of their use certificates, or to seek a variance or special exception. Petitioners' failure to take any of these actions prevents the characterization of the decision to rescind the certificates as a final decision — this conclusion is compelled by the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), and is supported by the decisions of the Circuit Courts and particularly the Third Circuit's decision in *Midnight Sessions. Ltd. v. City of Philadelphia,* 945 F.2d 667 (3d Cir. 1991), *cert. denied,* 112 S. Ct. 1668 (1992).

In *Williamson County,* the Supreme Court applied a substantive due process analysis in holding that a property owner's 1983 claim was premature because the property owner failed to seek variances from zoning and subdivision ordinances. *Williamson County,* 473 U.S. at 200, 105 S. Ct. at 3123. In *Williamson County,* the Court reasoned that the failure to seek variances meant that there had not been a final decision made regarding the application of the ordinances to the property in question. *Id.* While it is true that *exhaustion* of administrative remedies is not required in a 1983 action, *Patsy v. Florida Board of Regents,* 457 U.S. 496, 102 S. Ct. 2537, 73 L. Ed. 2d 172 (1982), the Supreme Court in *Williamson County* distinguished the case before it, stating that "the question of whether administrative remedies must be *exhausted* is conceptually distinct . . . from the question whether an administrative action must be *final* before it is judicially reviewable." *Williamson County, supra,* 473 U.S. at 192, 105 S.Ct. at 3119 (emphasis added).

The basis of the § 1983 claim in *Williamson County* was the eventual disapproval of a development plat by the Williamson County Regional Planning Commission (hereinafter "the Commission") after the petitioner bank's predecessor in interest, a land developer, had obtained approval of a preliminary plat for the development of a tract of land from the respondent Commission. The original approval was based upon the County ordinance and regulations in effect when the approval was given in 1973. The County ordinance was subsequently changed in 1977, thereby reducing the allowable density of dwelling units. Exercising its own discretion; however, the Commission continued to apply the 1973 regulations until 1979 when "the Commission reversed its position and decided that plats submitted for renewal should be evaluated under the zoning ordinance and subdivision regulations in effect when the renewal was sought." *Id.* at 178-79, 105 S. Ct. at 3112. The Commission then disapproved several plats for further development of the property for reasons including failure to

comply with density requirements under the ordinance and regulations then in effect.

At trial, the jury awarded damages to the petitioner, but the District Court granted judgment notwithstanding the verdict. The Sixth Circuit reversed, reasoning in part that the verdict indicated that the jury must have found that the petitioner acquired a vested right under state law to develop the property according to the plat approved under the 1973 ordinance. *Id.* at 184, 105 S. Ct. at 3115. The Commission argued before the Supreme Court that the application of regulations by a governmental entity should not be viewed as effecting a taking within the meaning of the Fifth Amendment. *Id.* at 185, 105 S. Ct. at 3116. Rather, the Commission argued that such conduct should be viewed as a violation, if at all, of the Fourteenth Amendment's due process clause if there is an invalid exercise of the government's police power. *Id.* In reaching its holding that the petitioner's claims were not ripe, the Supreme Court found that the question before it was not properly presented no matter how the governmental action was characterized, reasoning that "whether we examine the Planning Commission's application of its regulations under Fifth Amendment 'taking' jurisprudence, or under the precept of due process, we conclude that [plaintiff's] claim is premature." *Id.* The Supreme Court based its holding upon the fact that the petitioner could have sought variances from the Commission's *application* of the zoning and subdivision ordinances, but failed to do so. *Id.* at 200, 105 S. Ct. at 3123. The Court specifically indicated that the petitioner should have sought variances from the County Board of Zoning Appeals. *Id.* at 180 n.3, 188, 105 S. Ct. at 3113 n.3, 3117. The Court reasoned that the failure to seek variances meant that there had not been a final decision made regarding the application of the ordinances to the property in question. *Id.* at 200, 105 S. Ct. 3123.[7]

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7. The Court summed up its holding by stating that the plaintiff's "claim is premature, whether it is analyzed as a deprivation of property without due

(Cont'd)

The petitioners' attempt to distinguish the Supreme Court's decision in *Williamson County,* arguing that this Court's decision in *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982) is controlling where petitioners' substantive and procedural due process claims are grounded on a challenge to the constitutionality of the respondents' conduct, and not the constitutional rationality of the zoning regulations as applied to the petitioners' property. This issue, however, was directly before the Court in *Williamson County,* as the conduct complained of in *Williamson County* was the Commission's conduct/decision reversing its policy concerning which zoning ordinances and subdivision regulations it would apply to plats submitted for renewal. *Williamson County, supra* at 178-79, 105 S.Ct. at 3112. The *Williamson County* court specifically stated that even under its decision in *Patsy,* the *Williamson County* developers were required to:

> resort to the procedure for obtaining variances [which] would result in a conclusive determination by the Commission whether it would allow [the developer] to develop the subdivision [the developer] proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents [the developer] from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that [the developer] may develop the subdivision

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(Cont'd)

process under the Fourteenth Amendment, or a taking under the just compensation clause of the Fifth Amendment." *Id.* at 200, 105 S. Ct. at 3123-24. The court also stated that . . . [t]he Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility the respondent may develop the subdivision according to its plat after obtaining the variances. *Id.* at 193-94, 105 S. Ct. at 3120.

> according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether [the developer] will be denied all reasonable beneficial use of its property and therefore is not a final, reviewable decision.

Id. at 193-94, 105 S.Ct. 3120

The petitioners herein allege, as did those in *Midnight Sessions, Ltd v. City of Philadelphia,* 945 F.2d 667, 686 (3rd Cir. 1991), *cert. denied,* 112 S. Ct. 1668, that the respondents engaged in an invalid exercise of their police power amounting to a substantive due process violation. This claim was considered and rejected by the Supreme Court in *Williamson County* where it found that the petitioner's claim was not ripe, even when viewed as a substantive due process claim, despite the fact that the jury found that the petitioner acquired a vested right to develop its property according to a plat approved before the respondents reversed their position and began applying the later ordinance. *Williamson County,* 473 U.S. at 184, 191, 105 S.Ct. at 3115, 3119.

As discussed *supra*, the Supreme Court premised its holding that the petitioner's claims were not ripe on the fact that the *Williamson County* developer could have sought variances from the Commission or the County Board of Zoning Appeals, but did not. This is directly analogous to the situation in the instant case where the petitioners could have sought variances frorn the local Zoning Hearing Board, but failed to do so. The County Board of Zoning Appeals in *Williamson County* is the administrative equivalent of the local Zoning Hearing Board in this case. Both Boards are designated by law as the authority empowered to render for the local government a final decision.[8]

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8. *Compare*: the powers of the Williamson County Board of Zoning (Cont'd)

The petitioners also seek to distinguish and make inapplicable *Williamson County* by arguing that it involved a taking claim while in this case the petitioners are challenging the constitutionality of the respondents' conduct. This argument has no merit. This Court stated that the petitioner's claim was not ripe whether the claim was viewed as a taking claim or a due process claim. *Id.*, 473 U.S. at 199, 105 S. Ct. at 3123. Because the Court applied the ripeness analysis to these two views of the claim in the alternative, it is apparent that the Court does not require the presence of a taking claim in order to hold a due process claim not ripe.

The petitioners herein claim that the respondents' conduct alone may be sued upon under 1983, if it can be shown to have inflicted immediate injury. (Petitioners' Petition at 14-16). In *Williamson,* however, the developer had, prior to filing suit, appealed the Commission's initial rejection of its plat to the Board of Zoning Appeals which determined that the Commission had applied the wrong zoning regulations. Despite this decision, the Commission continued to reject the developer's plat, declining to follow the decision of the Board. It was as a result of this conduct that the developer filed suit. *Williamson,* at 180-82, 3113-14. The *Williamson* court found that the Developer was still required to seek a variance from Commission's decision prior to any claim becoming ripe for adjudication under 1983. *Id.* 193-94, 3120.

As the Third Circuit Court observed in its opinion below:

(Cont'd)

Appeals, "[t]o hear and decide appeals on any permit, decision, determination, or refusal made by the [County] Building Commissioner or other administrative official . . . [t]o hear and decide applications for variances from the terms of this resolution . . ." *Williamson, supra.* at 180 n.3, 3113 n.3 and the Pennsylvania Municipal Planning Code, "[t]he zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in . . . [a]ppeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit . . ." 53 P.S. § 10909.1(a) (App. at 477).

> Under Pennsylvania's Municipal Planning Code, Phillips must Administer the Township's zoning ordinance in the first instance. *See* Pa. Stat. Ann. tit. 53, 10614; *see also Rogin v. Bensalem Tp.*, 616 F.2d at 694 (zoning officer has "inflexible duty to apply zoning regulations as he or she understands them"). Any action by Phillips, however, did not represent the Township's final interpretation or application of the zoning ordinance. *See Rogin*, 616 F.2d at 694-95. Only the zoning hearing board's determination is a "final adjudication" under the terms of the Code. Pa. Stat. Ann. tit. 53, § 10909.1(a). The zoning hearing board has exclusive authority to determine whether Phillips failed to follow prescribed procedures or misinterpreted or misapplied any provision of the Township's ordinance. *See* Pa. Stat. Ann. tit. 53, § 10909.1. the Ordinance requires no deference by the zoning hearing board to Phillip's decision, and the zoning hearing board would have been free to consider the facts and circumstances of Patlakh's application anew. *See id.*

(Lower Court Opinion, Petitioners' Petition at 28a-29a) (footnotes omitted).

In *Midnight Sessions*, the Third Circuit also held that the petitioners' substantive due process claims were not ripe for judicial review even in absence of a takings claim. *Midnight Sessions*, 945 F.2d at 678-79. *Midnight Sessions* is consistent with the decisions in other Circuits that have applied ripeness analysis to constitutional claims in the absence of a taking claim. *Eide v. Sarasota County*, 908 F.2d 716, 723 (11th Cir. 1990); *Unity*

Ventures v. County of Lake, 841 F.2d 770, 775 (7th Cir. 1988).

In attempting to distinguish the instant case from takings cases that involve the effects that government action have upon a petitioner's use of its property; the petitioners ignore the damages that they have requested. (Petitioners' Petition at 12-13). As their primary damage request, the petitioners alternatively seek either $1,200,000.00 in lost rental revenues from the property over a ten year period, or approximately $1,000,000.00 representing lost proceeds from a sale of the property which was conditioned upon the property having the income level fixed in the Patlakh five year lease. It can be argued that the petitioners are, in effect, alleging a taking of property in all respects except in name.[9] Even if the petitioners' characterization of their claim as falling under the Fourteenth Amendment were accepted, any attempt by the petitioners to assert that this case is not about the effect of the respondents' actions upon the value of their property is disingenuous.

Contrary to the petitioners' claim, the lower courts herein have not decided this case in conflict with the several Circuit Court decisions relevant to the ripeness issue raised herein. The Ninth Circuit has followed the Supreme Court's decision in *Williamson County* holding that the final decision requirement is applicable to substantive due process, procedural due process and equal protection claims brought to challenge the application of land use regulations by government officials. *Traweek v. City and County of San Francisco*, 920 F.2d 589, 593-94 (9th Cir. 1990); *see also, Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990) (*citing Pennell v. San Jose*, 45 U.S. 1, 11 n. 5, 108 S. Ct. 849, 857 n. 5, 99 L. Ed. 2d 1 (1987); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989). According to the Ninth Circuit, a " 'final decision' requires at least: 1) a

9. *See, e.g. Eide*, at 723 n. 11, 726.

rejected development plan and 2) a denial of a variance." *Traweek*, 920 F.2d at 594. In *Traweek*, the Ninth Circuit held that the petitioners' claims for denials of substantive due process, equal protection and procedural due process (based upon the passage of an ordinance prohibiting Traweek's previously approved condominium conversion project) were not ripe for judicial review because the petitioner's failure to apply for a variance meant that there had not been a final decision. *Id.*

The petitioners' citation of the Ninth and Sixth Circuits' decisions in *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990) and *Nasierowski Brothers Investment Company v. City of Sterling Heights*, 949 F. 2d 890 (6th Cir. 1991) for the proposition that 1983 challenges to the actual conduct of local government land use regulators are ripe without seeking a further decision at the local level is inapplicable. In both *Harris* and *Nasierowski*, the courts found a denial of the petitioners' procedural due process rights based upon facial challenges to the manner in which the local governments enacted the zoning ordinances effecting the petitioners' properties. As enacted, the ordinances were different than the previously published proposals, were enacted with a specific provision effecting the petitioners' property, and the petitioners were not given notice and an opportunity to be heard in accordance with the governments' own rules and regulations.[10]

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10. Petitioners also rely upon the Rhode Island District Court decision of *P.L.S. Partners, Women's Medical Center v. Cranston*, 696 F. Supp. 788 (D.R.I. 1988), for the proposition that the ripeness requirement cannot be applied to a substantive due process claim. (Brief of Appellants at 33-37). *P.L.S.* is a District Court decision out of line with all Circuit Court decisions discussed *supra*, as can be seen from the Court's belief that "it is quite clear that the *Williamson* Court was addressing only the respondent's takings claim and was not considering the application of the ripeness doctrine to the respondent's substantive and procedural due process claims . . ." *Id.* at 795. This is clearly not the generally accepted reading of *Williamson County*, nor the law of any Circuit.

Here the petitioners do not claim that the Township failed to follow its own rules and regulations, but rather allege that although the zoning officer had the power to revoke the petitioners' permits for the reasons given that his true motivation was improper.

The Seventh Circuit explicitly adopted the reasoning of the Ninth Circuit in a decision wherein it applied the final decision requirement to hold that the petitioner-developer's substantive due process, procedural due process and equal protection claims were not ripe for judicial review. *Unity Ventures v. County of Lake*, 841 F.2d 770, 774-75 (7th Cir. 1988). In *Unity Ventures*, Circuit specifically stated that it would apply a ripeness analysis to the petitioner's equal protection and due process claims even though the petitioner's suit was not premised on a takings claim. *Id.* at 775. In *Unity Ventures*, the petitioners claimed that the respondents improperly denied their requests for linkage to an existing county-wide sewer system and their application for a permit to build their own sewer facility in an improper attempt to control the use of their property. *Id.* at 771. The petitioners claimed that the acts undertaken by the respondents included, *inter alia*, filing objections to construction of their own sewage treatment plant and rescinding an earlier resolution to consider allowing them to connect to the county-wide sewer system. *Id.* at 774. The court observed that although the petitioners claimed that this conduct on the part of the local land use planners demonstrated an intent to make any effort on petitioners' part to obtain a sewer connection futile, the petitioners had never formally requested a final decision from the local governing body with final decision making authority. *Id.* at 776. For this reason the court ruled that the case was not ripe for adjudication. *Id.*

The Court of Appeals for the First Circuit has also applied the ripeness doctrine in a recent decision. *Gilbert v. City of Cambridge*, 932 F.2d 51, 59, (lst Cir. 1991). As in *Unity Ventures*, the *Gilbert* court found that there had not been a rejected

development plan and therefore no final decision. Accordingly, the courts in those cases had no reason to reach the second requirement for a "final decision": a denial of a variance. *See Traweek*, 920 F.2d at 594.

Moreover, the Eleventh Circuit recently held in a case where a petitioner asserted a substantive due process challenge to a local authority's zoning decision, unaccompanied by any taking claim, that:

> [i]f the authority has not reached a final decision with regard to the application of tne regulation to the landowner's property, the landowner cannot assert an as applied challenge to the decision because, in effect, a decision has not yet been made. . . . Therefore, . . . for as applied arbitrary and capricious due process claims to be ripe, the particular zoning decision challenged must be finally applied to the property at issue.

Eide v. Sarasota County, 908 F.2d 716, 725 (1990) (footnote omitted).

As stated *supra*, the Third Circuit Court very recently applied the "final decision" requirement in a case factually very similar to the instant case. *Midnight Sessions, Ltd v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991). In *Midnight Sessions*, property owners who desired to open a dance hall claimed, among other things, that they were denied substantive due process when the City denied a certificate of occupancy and allegedly harassed the owners by citing them for violations. The Court of Appeals emphasized the fact that the property owners did not appeal the denial of the certificate of occupancy nor the citations for violations to the appropriate Review Board. The court held that the property

owners' substantive due process claim was not ripe, reasoning that:

> This failure to appeal precludes "final administrative action" by the City and, therefore, these claims were premature and should have been dismissed on summary judgment. Federal litigation of this kind is not intended to be a substitute for carefully constructed state procedures.

Id. at 686.

Under Pennsylvania's Municipalities Planning Code (MPC), the petitioners could have applied to the Zoning Hearing Board for variances and/or special exceptions. 53 Pa.C.S.A. § 10909.1(a)(5) and (6). The Pennsylvania MPC provides that a Zoning Hearing Board "shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant." 53 Pa.C.S.A. § 10910.2. Therefore, if the petitioners had applied for a variance, the Zoning Hearing Board had a non-discretionary duty to hear the request. Similarly, the petitioners could have applied to the Zoning Hearing Board for a special exception. 53 Pa.C.S.A. § 10910.2. Finally, the petitioners had a right to appeal the decision of the zoning officer to the Zoning Hearing Board. 53 Pa.C.S.A. § 10909.1(a)(3).

The record shows that the petitioners herein are experienced in real estate investment and development. (App. at 47-48, 53-54 and 134-35). The record also shows that the petitioners knew that they had recourse to the local Zoning Hearing Board. (App. at 44 [1600], 61, 113 and 128). However, petitioners did not take advantage of any of these established state procedures. Rather, it appears that the petitioners determined that they would bypass state procedures before they even received formal written notice

that the certificates were rescinded, because Price told the respondents during the January 8, 1991 meeting that she was going to sue them. (App. at 119-20). Obviously, the petitioners' threat of litigation and the costs attendant thereto was intended by the petitioners to force the respondents to permit the petitioners' improper use of the premises without the petitioners being required to first seek approval from the Zoning Hearing Board as required by law.

This Court should apply the final decision ripeness requirement to the case at bar pursuant to its decisions in *Williamson County,* the Third Circuit's decision in *Midnight Sessions,* and the cited cases from the other Circuit Courts of Appeal. The effect that the application of the zoning ordinances will have upon the petitioners in this case cannot be determined until a final decision is made as to how the zoning ordinance will be applied to the petitioners' property. A final decision was not made at the time the petitioners filed their 1983 claim here because the petitioners not only failed to apply for variances and/or special exceptions from the zoning ordinance as applied to their property, but also never sought all of the final inspections necessary to request and obtain an occupancy permit. It was precisely the petitioner's failure to seek variances that led the Supreme Court in *Williamson County* to conclude that there had been no final decision regarding petitioner's property. Therefore, petitioners' claim is not ripe and not judicially reviewable. This conclusion does not run afoul of the holding regarding exhaustion of administrative remedies in 1983 actions reached in *Patsy, supra,* 457 U.S. 496, 102 S. Ct. 2537, because, once again, "the question whether administrative remedies must be exhausted is conceptually distinct from the question whether an administrative action must be final before it is judicially reviewable." *Williamson County,* 473 U.S. at 192, 105 S. Ct. at 3119.

B.

THE LOWER COURTS DID NOT DEPART FROM ESTABLISHED PRECEDENT IN HOLDING THAT THE PETITIONERS' EQUAL PROTECTION CLAIMS (RACIAL ANIMUS) WERE NOT RIPE FOR JUDICIAL REVIEW.

As discussed *supra*, the petitioners make various arguments in support of their contention that they were not required to appeal the zoning officer's rescission of their use permits or seek a variance or a special exception. The most disingenuous of these arguments is that the petitioners' mere allegation of racial animus in the motives of the Township's zoning officer (or the other respondents) makes inapplicable the *Williamson* finality requirement.

Despite admitting that the zoning officer acted within the scope and authority of existing zoning regulations, the petitioners, who are not members of a suspect or quasi-suspect class, ask that this Honorable Court leap past the question of justiciability and presume improper conduct and a burden on others fundamental rights based merely upon the unfounded allegation made by the petitioners that respondents exerted pressure on the zoning officer based upon community fear that a twenty-four hour pool hall would attract black patrons.[11]

The primary contention of the petitioners, repeated throughout their petition, is that the lower courts misinterpreted their constitutional challenge and failed to focus on the motivalions of the respondents which they claim were ripe for immediate redress under 1983.

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11. Petitioners have apparently chosen not to support with legal authority their claim that the permits were rescinded for political reasons — "because the individual plaintiffs had alienated Township republican leaders in the past." (Petitioners' Complaint at ¶ 39; App. 390).

The petitioners use their claims of racial animus in an attempt to distinguish the precedent established in *Williamson County* and the Third Circuit's decision in *Midnight Sessions, LTD. v. City of Philadelphia*, 945 F.2d 667 (1991), *cert denied*, 112 S. Ct. 1668. However, as discussed *infra*, the lower courts did not mischaracterize the petitioners' constitutional challenge. Rather, the petitioners have mischaracterized and distorted the reasoning of *Williamson County* and it progeny.

The identical issue raised by the petitioners herein has been previously decided by the lower court in its decision in *Midnight Sessions LTD. v. City of Philadelphia*, 945 F.2d 667 (3rd Cir. 1991), *cert denied*, 112 S. Ct. 1668, wherein the petitioners raised the claim that the City's conduct toward them was based in part upon racial animus.[12] The Court's analysis of the ripeness of the petitioners' equal protection claim in *Midnight Sessions* provides in pertinent part as follows:

> Down South's claim that the City arbitrarily and irrationally enforced fire and building regulations to drive it out of business confronts a different obstacle; its substantive due process challenge never ripened for this portion of its claim. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 200, 105 S. Ct. at 3123, the Supreme Court, employing a substantive due process analysis, held that the respondent's claim that a regulation was an invalid exercise of the police

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12. "The Plaintiffs also alleged that the City denied them equal protection of the laws, asserting in this regard, among other things, that it engaged in intentional race discrimination because it would not license the dance halls as they were in white neighborhoods, but catered to a young black clientele." *Midnight Sessions*, at 670.

> power was premature because it failed to seek variances from certain zoning ordinances and subdivision regulations and, thus, there had not been a final decision on the application of those ordinances and regulation to respondent's property.

Midnight Sessions, 945 F.2d at 686.

The Court continued:

> Down South did not appeal to the Review Board the citations for violations it received from L & I nor the denial of the Certificate of Occupancy. This failure to appeal precludes "final administrative action" by the City and, therefore, these claims were premature and should have been dismissed on Summary Judgment. Federal litigation of this kind is not intended to be a substitute for carefully constructed state procedures.

Id.

It is not clear how the petitioners can contend that the lower courts erred in relying upon this Court's decision in *Williamson* and *Midnight Sessions*. In these cases claims on all fours with those asserted by the petitioners, claims of arbitrary and capricious acts by governmental officials amounting to an abuse of power, are clearly held not be ripe until the local entity given authority to render a determinative decision has done so. In *Midnight Sessions*, the Down South petitioner's claim was "that the City arbitrarily and irrationally enforced fire and building regulations to drive it out of business. . . ." *Midnight Sessions*, 945 F.2d at 686. In fact, Down South asserted that it was put out of business. *Id.* at 673.

Therefore, the Down South petitioner was complaining of arbitrary and capricious acts by governmental officials amounting to an abuse of power just as the petitioners claim in this case. Nonetheless, the Third Circuit, relying on *Williamson County*, held that Down South's substantive due process claim based upon alleged arbitrary and irrational *acts* was premature because Down South's failure to appeal meant that there had not been final administrative action by the City. *Id.* Thus, petitioners' argument that a claim of racial animus makes the final decision requirement of *Williamson* inapplicable is clearly without merit.[13]

The petitioners also contend that the Eleventh Circuit's decision in *Eide* recognizes that an arbitrary and capricious due process claim could be ripe upon the performance of a single act.

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13. The Eleventh Circuit stated that:

> [i]f the authority has not reached a final decision with regard to the application of the regulation to the landowner's property, the landowner cannot assert an as applied challenge to the decision because, in effect, a decision has not yet been made . . . Therefore, . . . for as applied arbitrary and capricious due process claims to be ripe, a particular zoning decision being challenged must be finally applied to the property at issue. *Id.* at 725.

The Seventh Circuit also applies the final decision requirement to due process and

> equal protection claims in the absence of a taking claim. *Unity Ventures v. County of Lake*, 841 F.2d 770, 774-75 (1988). Moreover, this Court applied the final decision requirement in *Midnight Sessions* after finding that the asserted taking claim was invalid. *Midnight Sessions*, 945 F.2d at 678-79. Thus, the ripeness requirement may be applied in cases involving no valid taking claim.

(Brief of Appellants at 36). However, the actual passage cited merely stands for the proposition that an act or decision taken without any rational basis whatsoever may serve as a basis for merely having the decision overturned and possible injunction issued prohibiting future such irrational acts or decisions. *Eide*, at 726. Importantly, neither relief is requested here by the petitioners.

In *Midnight Sessions*, the Down South petitioner claimed that the respondents arbitrarily and irrationally enforced fire and building regulations to drive it out of business. *Midnight Sessions*, 945 F.2d at 686. The alleged arbitrary and capricious acts by the respondents were completed, and Down South claims that it had in fact been run out of business by the respondents' acts of harassment. *Id.* at 673. Nonetheless, this Court held that Down South's due process claim was not ripe for lack of a final decision because the petitioners had not tested the rationality of these citations by appealing them. Id. at 686. Accordingly, the petitioners' argument in this case lacks merit.

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Honorable Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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